



Case No. SCSL-2004-14-T  
THE PROSECUTOR OF  
THE SPECIAL COURT  
V.  
MOINI NA FOFANA  
ALLIEU KONDEWA

WEDNESDAY, 19 SEPTEMBER 2007  
10.05 A.M.  
SUBMISSIONS ON SENTENCING

TRIAL CHAMBER I

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Before the Judges:	Benjamin Mutanga Itoe, Presiding Pierre Boutet
For Chambers:	Mr William Romans Ms Peace Malleni Ms Sandra Brown
For the Registry:	Mr Thomas George
For the Prosecution:	Mr Stephen Rapp Mr James C Johnson Mr Joseph Kamara Mr David Cohen Ms Amanda Grafstrom (Case manager)
For the accused Moinina Fofana:	Mr Steven Powles Mr Arrow Bockarie Mr Andrew Ianuzzi
For the accused Allieu Kondewa:	Mr Charles Margai Mr Yada Williams Mr Ansu Lansana

1 [CDF19SEP07A - MD]

2 Wednesday, 19 September 2007

3 [The accused present]

4 [Open session]

10:09:24 5 [Upon resuming at 10.05 a.m.]

6 PRESIDING JUDGE: Good morning, learned Prosecutor, learned  
7 counsel on both sides.

8 May I seize this opportunity to welcome all of us back to  
9 this forum after a very well deserved rest, although amongst some  
10:09:46 10 of us there was no rest, really, because we were in various  
11 [indiscernible], both civil and political, all over the place.

12 Be it what it may, we thank God that we are able to be here  
13 and that our lives were spared. This said, you are welcome and I  
14 think we would proceed with our proceedings. As you will already  
10:10:16 15 have noticed from the composition of the Bench this morning,  
16 Honourable Justice Bankole Thompson is absent from today's  
17 hearing. This unavoidable absence is attributable to medical  
18 reasons. We trust that Justice Thompson will be joining us  
19 within the next couple of days.

10:10:44 20 Accordingly and pursuant to Rule 16(A) of the Rules, we, in  
21 the interests of justice, order that the proceedings will  
22 continue in his absence and as we stated in our scheduling order  
23 of 2 August 2007, the Bench will, during this sentencing hearing,  
24 limit each of the parties to a maximum of one-hour submissions  
10:11:15 25 in addition to the filed written briefs which we find quite  
26 comprehensive if they so wish to so exercise this option. We say  
27 this because you are not really obliged to making any oral  
28 submissions because we find your submissions, your written and  
29 filed briefs, sufficiently comprehensive, but if you wish to do

1 so, you may exercise that option.

2 It is up to the parties to determine how they wish to make  
3 use of that time, which they could curtail considerably in an  
4 effective and efficient pleading strategy. We would request that  
10:12:02 5 court time is not wasted in restating submissions and the  
6 statutory or regulatory provisions on this subject which have  
7 already been detailed in the filed briefs that we have read and  
8 with which we are already very familiar.

9 We also wish to inform the parties that the sentencing  
10:12:30 10 judgment of the Court will be delivered at 3 p.m. on Monday,  
11 1 October 2007, in this Courtroom instead of on Monday, 24  
12 September, as we had earlier scheduled.

13 As a preliminary issue, and before you begin making your  
14 respective oral submissions directly related to sentencing, if  
10:13:01 15 you so wish, the Chamber recalls that it is seized of the  
16 Prosecution's response to Defence request for leave to supplement  
17 the Fofana sentencing brief filed on 14 September 2007 in which  
18 it objected to the Defence's request for leave to supplement the  
19 Fofana sentencing brief filed on 10 September 2007.

10:13:33 20 We would now hear your arguments on it and dispose of it  
21 before continuing with hearing the substantive submissions for  
22 sentencing. The Chamber will now call on the parties to limit  
23 their submissions on this issue to up to ten minutes each.

24 First, the Fofana Defence team, which introduced the  
10:14:02 25 application and then the Prosecution in reply. Yes, learned  
26 counsel you have the floor.

27 MR POWLES: Thank you very much, Your Honours, and may I  
28 say good morning to both Your Honours on behalf of the Fofana  
29 team.

1           PRESIDING JUDGE: We have it on record of course that the  
2 appearances of the parties are the same, so I didn't call for any  
3 announcements.

4           MR POWLES: I am grateful, Your Honour. May I begin by  
10:14:34 5 stating for the record of course that we are concerned that His  
6 Honour Justice Bankole Thompson is not present this morning at  
7 this important phase of the trial proceedings and, of course, we,  
8 like everyone, wish him a speedy recovery but of course we note  
9 Your Honours' decision this morning in that regard.

10:14:56 10           With regard to the admission of further materials, may I  
11 begin by of course noting that in the Prosecution's sentencing  
12 brief, the Prosecution indicated that they would reserve the  
13 right to adduce further materials and call further materials, and  
14 potentially even call witnesses at the sentencing phase.

10:15:20 15           At page 33, paragraph 105 of the Prosecution sentencing  
16 brief, the Prosecution state that it reserves the right with the  
17 leave of the Chamber at any sentencing hearing to call witnesses,  
18 submit documentation, including reports, and give oral  
19 submissions on the impact of the crimes on the victims.

10:15:40 20           So the Prosecution, it seems, accepts in principle,  
21 firstly, witnesses may be called, and second of all, documentary  
22 materials may be submitted in support of submissions to be made.  
23 We would say that it is of course disappointing that the  
24 Prosecution now seek to take a different stance in relation to  
10:16:00 25 materials the Defence seek to put before the Court with a view to  
26 assist the Court in reaching the right, fair and proper  
27 determination of sentence with regards to Moinina Fofana.

28           The statements that the Defence seek to rely upon are  
29 essentially six. One of course deals with Moinina Fofana's time

1 in the detention unit and his behaviour and conduct therein. The  
2 other five statements --

3 THE INTERPRETER: Your Honours, can I learned counsel please  
4 talk slowly.

10:16:31 5 PRESIDING JUDGE: Yes. I hope you take in --

6 MR POWLES: I have heard that, Your Honours. My apologies  
7 to the learned interpreters.

8 The Fofana Defence seek to admit five statements into  
9 evidence for the simple purpose of, firstly, showing that  
10:16:50 10 upstanding members of Sierra Leonean Civil Society showed support  
11 and attest to the character of Moinina Fofana. So it's important  
12 to stress that those statements go to character, not to criminal  
13 conduct.

14 Second of all, we seek to rely on five of those statements  
10:17:11 15 to show that Moinina Fofana made a substantial contribution to  
16 peace and reconciliation in Sierra Leone.

17 The statements deal with conduct post the middle of 1998  
18 and, of course, all the crimes Mr Fofana has been convicted of  
19 occurred in the early part of 1998.

10:17:33 20 JUDGE BOUTET: You say it's post-1998, so that's the  
21 submission?

22 MR POWLES: The submission is --

23 JUDGE BOUTET: This is targeting and focusing on the period  
24 from 1998 up to now?

10:17:47 25 MR POWLES: Up to now, Your Honour, yes. The statements  
26 don't deal with conduct before the middle of 1998. I believe one  
27 of the statements contains a typographical error and makes  
28 reference to 1997, but it must mean 1998, given the context of  
29 the statement as a whole because the witness indicates that he

1 was in another country, in Guinea in fact, during August 1997, so  
2 it must be a reference to August 1998. Again, to stress, all of  
3 the conduct goes from the post the middle of 1998 to the present  
4 time. Of course, none of the statements seek to go behind the  
10:18:23 5 Trial Chamber's findings as made against Moinina Fofana in the  
6 judgment delivered earlier this year.

7 In relation to precedent, may we refer to the following:  
8 The Prosecution of course refer to the refusal of the Trial  
9 Chamber in the AFRC case to admit Prosecution materials in that  
10:18:45 10 case. It's right that Prosecution materials were rejected in  
11 that case because they went to criminal conduct. It's right to  
12 say that a character statement by one of the accused certainly  
13 was admitted by the Trial Chamber in those proceedings.

14 It's also right to say that at the ICTY, at a time when the  
10:19:07 15 ICTY had a split trial phase and then sentencing phase that  
16 materials were allowed and admitted on behalf of the Defence to  
17 show the character of the accused before the Court that was to  
18 proceed to sentence him.

19 Finally, may I refer to authority from this Chamber,  
10:19:24 20 authority referred to, again, in the Prosecution's sentencing  
21 brief in support of their submission that the Prosecution reserve  
22 its right to admit and call witnesses and submit documentation.  
23 At paragraph 105 of their sentencing brief, the footnote in  
24 support of that, footnote 201, as submitted and relied upon by  
10:19:47 25 the Prosecution, the Prosecution referred to this Trial Chamber's  
26 decision in the Sesay, Kallon and Gbao status conference, and  
27 they refer to the transcript where it's said that the Trial  
28 Chamber indicated there is a bifurcated process where sentencing  
29 is separate from the trial process.

1           So that is the support in law that we seek to rely upon to  
2 demonstrate that it must be right in fairness and commonsense  
3 that we can admit evidence in support of Moinina Fofana's  
4 character at this stage.

10:20:27 5           Fourthly and finally, the Prosecution's objection to these  
6 materials, it must be noted, came on Friday evening of last week.  
7 I did not receive notice of it until certainly over the weekend  
8 and only arrived in Freetown on Saturday night of this weekend.  
9 It's right to note that the Prosecution have had the statements  
10:20:46 10 contained within the sentencing brief since 31 August of this  
11 year. The Prosecution then waited two weeks to raise this issue  
12 and raise any objection to the admission of those statements.  
13 Effectively, they have waited until the 11th hour to make their  
14 objection.

10:21:06 15           It's been difficult now for the Defence to get and obtain  
16 all the witnesses to be here to give oral evidence before Your  
17 Honours and before this Honourable Trial Chamber. That said,  
18 efforts have been made to obtain and ensure the presence of at  
19 least one witness to be here to attest to the character of  
10:21:26 20 Moinina Fofana. That witness is Mrs Francis Fortune, who is here  
21 to deal with the four issues of Moinina Fofana's character and  
22 his contribution to the peace process post the middle of 1998 and  
23 thereafter and it's right to say that we do intend to call her as  
24 part of our oral submissions to the Court, only very briefly, to  
10:21:51 25 set the scene and to give the Honourable Trial Chamber a  
26 possibility to see her give evidence in relation to this, what we  
27 say is an important issue.

28           For all of those reasons, Your Honours, we submit it is  
29 right and proper and fair for this Honourable Chamber to hear

1 Francis Fortune and to admit the other statements in support of  
2 Moinina Fofana's character and good behaviour.

3 PRESIDING JUDGE: Is that all you have to submit on this?

10:22:23

4 MR POWLES: Your Honours, yes, unless Your Honours would  
5 like me to address any point in particular.

6 PRESIDING JUDGE: I don't think we have any question to  
7 put. Your submissions have been brief and comprehensive and we  
8 would call on the Prosecution to reply to the arguments raised by  
9 Mr Powles.

10:22:47

10 MR KAMARA: Thank you, Your Honours. I will start with the  
11 fact that in the Prosecution sentencing brief, we did indicate  
12 that if it comes to the crunch, we will call witnesses to support  
13 our position and we still maintain that.

10:23:04

14 My Lord, with regard to this particular motion, it is the  
15 Prosecution position that evidence cannot be brought in through  
16 the back door. The Fofana Defence had an entire period and  
17 session when they dealt with their cases and, My Lord, these  
18 witnesses were originally listed as witnesses for this trial and  
19 they were dropped off and now, My Lord, at this point in time of  
20 this trial phase, that is the sentencing, we cannot be seen to  
21 entertain these very witnesses that are meant to have been heard  
22 and subjected to the rigours of cross-examination, come now and  
23 evidence be admitted without any form of cross-examination and  
24 yet seek this Court to make a finding on that.

10:23:30

25 JUDGE BOUTET: I would like you to make the  
26 differentiation, if at all possible, with regard to the  
27 submission that has been made. We are talking here of witnesses  
28 that are being called to speak about character.

10:23:50

29 MR KAMARA: Yes, My Lord.



1 JUDGE BOUTET: Nothing more. Whether they were witnesses  
2 listed, if the only purpose was to call these witnesses for  
3 character purposes in the main trial, as such, what relevance was  
4 there of that kind? I mean, we had enough witnesses on all sorts  
10:24:21 5 of subject matters, as such, and as we have a special procedure  
6 for sentencing, why would they call them as part of the main  
7 trial?

8 MR KAMARA: Your Honour, whether they call them or not and  
9 the reason for not calling them is within their own purview but,  
10:24:38 10 My Lord, with all due respect --

11 JUDGE BOUTET: It's not a question of within their own  
12 purview, it's a question of relevance, as such. They are not the  
13 sole decider on these facts, as such. They intend to call  
14 witnesses that have no relevance to the fundamentals of the  
10:24:49 15 trials at that time. We were not talking character evidence at  
16 that time.

17 MR KAMARA: My Lord, it is not for you to provide  
18 information why they failed to call, suggesting that it is  
19 because character was not relevant at the time. It is not. With  
10:25:01 20 due respect to you, My Lord, the fact at issue here is if it is  
21 evidence that relates to character per se, period, then it will  
22 be admissible. It is right for this Court to listen to that  
23 evidence. But if it goes beyond and it touches on the acts and  
24 conduct of the accused, it is matters that have been determined  
10:25:19 25 and settled by this Honourable Court then we cannot entertain any  
26 more evidence from any witness that cannot be cross-examined and  
27 accept this Court to [overlapping speakers] those issues.

28 JUDGE BOUTET: Again, this is not the submission that has  
29 been made, unless I missed completely what they have argued.

1 What they are intending to do is call these witnesses, not to go  
2 to the facts that were adjudicated upon, but simply and only as  
3 to the character of the accused at that time, that's all.

4 MR KAMARA: I beg to defer with you, My Lord. If you look  
10:25:47 5 at our submissions and in our response, you look at paragraph 5,  
6 My Lord, there are issues that go to acts and conduct of the  
7 accused, not just on character. Not just on character, My Lord.  
8 It is wrong for us to conclude that these witnesses will only be  
9 allowed to bring facts out on character when, clearly, the  
10:26:06 10 statements point to acts and conduct of the accused.

11 My Lord, at paragraph 5, it is there that assertions,  
12 subject to debate based on the evidence, and in the statement of  
13 Simon Arthy, it says, "Fofana's commitment to promoting peace and  
14 reconciliation in the Southern Region was irrefutable." My Lord  
10:26:22 15 that is nothing unto character. It goes to the conduct of the  
16 accused. Say that no one can allege the position of the accused  
17 during that period as regards to his efforts in peace and  
18 reconciliation. My Lord, I cannot concede that to be an issue of  
19 character, but a matter that goes to the conduct of the accused,  
10:26:36 20 and this Honourable Court has come to the conclusion as regards  
21 to the conduct and acts of the accused. We cannot now listen to  
22 any evidence coming through the back door or through a window  
23 without subjecting it to the rigours of cross-examination.

24 And, My Lord, it is not the Prosecution's position that we  
10:27:05 25 are objecting to each and every statement or each and every  
26 aspect of the statements. My Lord, we are aware and indeed  
27 concede that if it only goes to the character, the Court has  
28 every right to listen to matters that relate to character. But,  
29 My Lord, in the reference where it impacts, the impact

1 statements, we, the Prosecution, still do believe that that can  
2 be admitted. But the issue here is not on impact evidence,  
3 neither is it just on mere character, but anything that goes  
4 beyond character and affects the conduct and act of the accused,  
10:27:41 5 My Lord, it is transcended into that arena for which this  
6 Honourable Bench has taken a decision.

7 And, My Lord --

8 PRESIDING JUDGE: Is it therefore your submission that  
9 where those statements only relate to character, the Court can  
10:28:03 10 look into them and that where they concern criminal conduct and  
11 acts of the accused the Court cannot; is that your position?

12 MR KAMARA: At this stage, My Lord.

13 PRESIDING JUDGE: At this stage?

14 MR KAMARA: Yes. At this stage, the Court cannot call and  
10:28:21 15 listen to fresh evidence that relates to the acts and conduct of  
16 the accused after the Court has made a determination on those  
17 same issues. For example, as I mentioned in paragraph 5, someone  
18 making an assertion, a global assertion at that, that the efforts  
19 made by this man for peace and reconciliation during the relevant  
10:28:40 20 time for which this Court has jurisdiction - during the relevant  
21 time for which this Court has jurisdiction - and the Court has  
22 made a determination as to that period, and he is also relating  
23 to a crime base in Bo.

24 Now we are subjected to come and listen to fresh evidence  
10:28:55 25 creeping in through the window and to suggest that, yes, during  
26 that period it is irrefutable, I quote again, irrefutable. How  
27 can one make an assertion and ask this Court to accept a  
28 statement like that? My Lord, if and, honestly, I believe in the  
29 wisdom of this Court, we can go into these individual s'

1 statements, tear them apart and examine them at length, and  
2 select what you will find that only relates to character and  
3 leave out what does not relate to character. My Lord, that is a  
4 painstaking exercise. Why do we want to go all through that  
10:29:32 5 exercise when we start sifting: First sentence is right; second  
6 sentence, no; third sentence, right; fourth sentence, no.

7 PRESIDING JUDGE: Why not, if it concerns the character if  
8 we only want to base our judgment and our attention, focus it on  
9 character?

10:29:46 10 MR KAMARA: Very well, My Lord.

11 PRESIDING JUDGE: Don't you think it is necessary for us to  
12 put the statements through the sifting process which you are  
13 referring to?

14 MR KAMARA: Very well, My Lord. I will concede to that.

10:29:56 15 JUDGE BOUTET: More so, if I may add, that is essentially  
16 the proposition you made to dispense on the main trial. You  
17 asked this Court to sift through the evidence all through the  
18 trial, as such, and even in the submissions. So why is it  
19 different at this particular time?

10:30:11 20 MR KAMARA: I do remember, My Lord. You get me on that  
21 one. I will concede. We will examine them, My Lord, but as long  
22 as we, with a fine toothbrush, look at it and pick out what might  
23 affect a dentition and what might not affect a dentition, we  
24 throw out of the window. My Lord, we are not really totally  
10:30:28 25 averse to the admission of the statements, as long as they are  
26 helpful to the Court. What is not helpful to the Court, no one  
27 can come back and relitigate issues for which this Court has made  
28 a finding. My Lord, that is all we have to say on this issue and  
29 the motion.

1 PRESIDING JUDGE: Yes. Do you -- I suppose, as usual, you  
2 do trust this Court with the ability and the competence to look  
3 into these statements and examine them with a fine-tooth comb and  
4 to come out with what is necessary, even without calling  
10:31:06 5 witnesses for the purposes of cross-examination, because I  
6 imagine one of your contentions is that these statements cannot  
7 be admitted because you don't even have the witnesses before you  
8 for the purposes of subjecting them to cross-examination.

9 But here, I put the question to you: I suppose you do  
10:31:29 10 trust the Court, you know, with the duty and the competence to  
11 look at these statements and to see how we draw a line between  
12 the submissions of the Defence, and your objections to these  
13 statements and their entire contents. Do you, Mr Kamara?

14 MR KAMARA: Yes, My Lord, I do trust the Court and I see  
10:31:52 15 the clever way you are putting me on the spot. My Lord, I do  
16 trust the Court, and I believe that if it comes to the crunch  
17 these statements are admitted, that they will only be looked at  
18 in terms of its weight. My Lord, with that, I will concede to --  
19 I see you are about to --

10:32:13 20 JUDGE BOUTET: No, I was just waiting until you had  
21 finished your sentence.

22 MR KAMARA: Yes, My Lord. I have been trapped but I will  
23 work with the Court to the extent that these statements can be  
24 admitted and on the reliance and belief that I have in the system  
10:32:29 25 of justice and for this Court that they will be looked into and  
26 only the necessary weight attached to where it is necessary and  
27 issues that touch and concern facts, acts and conduct of the  
28 accused will not be addressed. If that happens, then, My Lord,  
29 we will be prejudiced because we would not have had an

1 opportunity to examine and to cross-examine these witnesses, one  
2 of which, particularly, I have been longing to do.

3 JUDGE BOUTET: Mr Kamara, I just would like to understand  
4 clearly your position with respect to your paragraph 105 where  
10:33:02 5 you say the Prosecution, and this has been touched upon by the  
6 Defence, to say I am not sure that you understand your position  
7 now what is stated in that -- in your Prosecution's position,  
8 where you are asking the Court, at any time during the sentencing  
9 hearing, right to call witnesses, sign the documentation and so  
10:33:27 10 on. How do you reconcile that with your position? Presumably,  
11 if I can put it this way, you are saying you could call evidence  
12 of that nature that goes to the character, nothing more?

13 MR KAMARA: Yes, My Lord, thank you for drawing our  
14 attention to that. My Lord, that particular paragraph there was  
10:33:44 15 incited with a view to what is happening before this Court now.  
16 We envisage the situation where the Defence will come in and want  
17 to bring evidence, and that is why we reserved our own right to  
18 call on witnesses at any -- during the sentencing hearing to  
19 submit documentation that will include reports and oral  
10:34:04 20 submission that will counter any question or issues raised by the  
21 Defence wanting to do the same. We reserve the right. We  
22 reserve the right there.

23 JUDGE BOUTET: Without descending on this particular issue,  
24 what is your position now? You know what the Defence is  
10:34:19 25 proposing. Are you intending to call any such evidence?

26 MR KAMARA: No, My Lord, our position now is that we are  
27 not calling any evidence. We are not calling any witnesses. My  
28 Lord, we say this: If they do call witnesses, then we will want  
29 to call witnesses.

1 JUDGE BOUTET: Well, they are. They have just said this  
2 morning that they are calling one witness.

3 MR KAMARA: That is the one I have opposed. That  
4 particular witness I have opposed. To the extent that at most,  
10:34:39 5 or at best, we can admit that statement. Why I am very much  
6 insistent on that, My Lord, the statement, if you take a look, is  
7 an evidence that was submitted on the issue of bail. It is an  
8 affidavit that was submitted on the issue of bail. My Lord,  
9 there are glaring issues of bias, clearly glaring issues of bias.

10:35:00 10 JUDGE BOUTET: Mr Kamara, are you talking of Mrs Fortune?

11 MR KAMARA: Yes, My Lord, that's that witness --

12 PRESIDING JUDGE: Frances Fortune?

13 MR KAMARA: Yes, My Lord, that was the witness they want to  
14 call. There are glaring issues of bias. That statement was  
10:35:10 15 taken from a bail application in 2004.

16 JUDGE BOUTET: Yes, but she is being called. The objection  
17 was that you are not entitled to cross-examine that witness.  
18 They are proposing to call her this morning and therefore you  
19 will be entitled to cross-examine her. So that is why I am  
10:35:21 20 asking you the question.

21 MR KAMARA: Yes, My Lord. If they are calling her and she  
22 states only onto the track that they want her. She one moment  
23 moves away, My Lord, if we have to say something in --

24 JUDGE BOUTET: You know that you will not be shy to stand  
10:35:34 25 up and object to it, if that is the case, Mr Kamara.

26 MR KAMARA: Yes, My Lord. Understand my position, My Lord.  
27 If they are calling witnesses as to character, agreed. And they  
28 make such a case for which we may need to rebut, My Lord, we are  
29 not prepared for that. And from the scheduling order it says:

1 For oral submissions only. If she comes here and makes such an  
2 elaborate case as she has done in the bail application, what  
3 position do we find ourselves as the Prosecution?

4 We cannot go back out there and rebut the position on what  
10:36:05 5 she is coming to say about character, and that is why I want to  
6 insist that we go according to what the scheduling order said.  
7 We are only here to do oral submissions. At best, we might admit  
8 her statement subject to the tooth comb procedure. But for her  
9 to come in as a witness, we can do that, of course. I can  
10:36:23 10 subject her to cross-examination. But if she goes on and  
11 bringing this elaborate sainthood, My Lord, we will want to call  
12 somebody to come forward with character evidence in rebuttal as  
13 well. And I don't want to, I don't want this Court to be pushed  
14 to that position. We want to bring these proceedings to an end.

10:36:44 15 JUDGE BOUTET: Thank you.

16 PRESIDING JUDGE: Thank you. Yes, Mr Powles.

17 MR POWLES: Your Honour, if you will indulge me for a  
18 moment.

19 PRESIDING JUDGE: Three minutes?

10:36:52 20 MR POWLES: Three minutes at most.

21 PRESIDING JUDGE: Yes.

22 MR POWLES: It's right to say the Prosecution has sought to  
23 admit further evidence that wasn't part of the trial record.  
24 Annexed to their sentencing brief are a number of materials and  
10:37:05 25 documents from annex F onwards that deal with articles on the  
26 impact of the crimes on victims, they were not part of the trial  
27 record, but I should state for the record, and clearly and  
28 categorically, that on behalf of the Defence we don't object to  
29 those materials coming into this process before the Trial



1 Chamber. We don't object because we accept it's right and proper  
2 for the Trial Chamber to have as much material as possible before  
3 it in reaching a right, proper and fair determination with  
4 regards to sentence.

10:37:38 5 In relation to the assertion that we are seeking to get in  
6 evidence through the back door, that is simply not right, proper  
7 or fair. The transcript referred to, the Trial Chamber  
8 transcript from the status conference of 20 March this year in  
9 the RUF case, the Prosecution cited and relied upon for the  
10:37:58 10 proposition that evidence and materials could be brought further  
11 at this stage. There was quite clearly, with there being a  
12 divided stage and different stages within the trial process, a  
13 trial stage where the guilt or innocence of the accused was  
14 determined and the sentencing stage where proper submissions are  
10:38:17 15 made and evidence called in relation to mitigation, the conduct  
16 of the accused not related to the crimes and his character  
17 generally.

18 It was quite clearly stated by Your Honour, Learned Judge  
19 Itoe, that there is a divided trial stage where evidence in  
10:38:32 20 relation to guilt or innocence is called at the trial stage and  
21 evidence relevant to mitigation of sentence would be called at  
22 this stage of the proceedings. And that is precisely what we  
23 were doing.

24 It's right that some of the witnesses and statements that  
10:38:47 25 we now seek to rely upon were originally listed as part of the  
26 Defence materials at the trial stage. We took a conscientious  
27 decision, and the right decision we submit, not to call those  
28 witnesses at that stage because they didn't go to the criminal  
29 conduct as alleged by the Prosecution against the accused. They

1 went to his character and his contribution to peace-building, and  
2 that is why we seek to rely on those materials now rather than  
3 having called them during the trial phase.

4 Just finally, the materials that we seek to rely upon go to  
10:39:21 5 the character and the conduct of the accused so far as his  
6 conduct goes to reconciliation and peace-building. It doesn't go  
7 to the criminal conduct of the accused but his conduct with  
8 regards to reconciliation and peace-building because we say it is  
9 that conduct that is relevant for the Trial Chamber to assess and  
10:39:41 10 consider with regards to his character and the right and proper  
11 sentence that should be imposed upon him.

12 All of the conduct of the accused with regards to his  
13 contributions to peace-building post-date the criminal period as  
14 found by the Trial Chamber, namely, January and February of 1998.

10:40:00 15 My learned friend referred to crimes committed in Bo.  
16 Those crimes, as Your Honours will know, occurred in February of  
17 1998. The conduct of the accused in Bo that we seek to rely upon  
18 in his contribution towards peace-building starts in the middle  
19 of 1998 and thereafter. And, My Lords, those would be our  
10:40:19 20 submissions with regards to the admission of these statements.

21 PRESIDING JUDGE: Thank you.

22 Learned counsel, the Chamber will rise for a very short  
23 while and resume sitting very shortly. The Court will rise,  
24 please.

10:41:04 25 [Break taken at 10.39 a.m.]

26 [Upon resuming at 10.55 a.m.]

27 PRESIDING JUDGE: We are resuming the session, and this is  
28 our brief oral ruling on this issue.

29 The Chamber, after hearing the arguments of both the

1 Defence and the Prosecution, on the issue of admitting documents  
2 that are tendered by the Defence of the second accused in this  
3 matter, and the reply to this by the Prosecution, decides as  
4 follows:

11:00:01 5 The evidence as annexed to both the Defence and Prosecution  
6 briefs is hereby admitted, but only as far as it concerns  
7 character evidence. Any statements which go to the acts and  
8 conduct of the accused, that have been the subject of the  
9 judgment, will be disregarded by the Chamber.

11:00:34 10 The Chamber does not deem it necessary to call any  
11 witnesses at this stage. Accordingly, the application to call  
12 Miss Frances Fortune is denied.

13 We would now proceed with the sentencing hearing, and I  
14 think it's only proper for us to call on the Prosecution to set  
11:01:02 15 the ball rolling with the arguments that they have presented in  
16 their brief. And, as we have said, we have gone through these  
17 briefs, and although we accorded an hour to each party, and maybe  
18 the Prosecution might have asked for more because they have to  
19 reply to two briefs, you are not really constrained to taking the  
11:01:28 20 whole hour and we trust you for your efficient case management to  
21 save the Court time so that we get into the real business of  
22 delivering our decision on this matter.

23 And this counsel holds good for all the Defence teams.  
24 Yes, Mr Kamara.

11:01:54 25 MR KAMARA: Thank you, Your Honour.

26 PRESIDING JUDGE: May we hear you on your briefs  
27 relating -- on your argument, on your oral arguments relating to,  
28 first of all, the sentencing of Mr Moinina Fofana and thereafter  
29 Mr Allieu Kondewa.

1 MR KAMARA: Yes, My Lord. Thank you, Your Honours. Once  
2 again I take this opportunity with pleasure to address this Trial  
3 Chamber and to provide any assistance as may be deemed necessary  
4 in the sentencing proceedings.

11:02:35 5 My Lord, certain aspects of my submissions will be referred  
6 to both accused persons to save time, but at certain stages I  
7 will separate the two.

8 My Lords, I crave the indulgence of this Bench to allow me  
9 to dilate briefly on the legal issues as it relates to sentencing  
11:02:56 10 procedure generally and, more specifically, respond to some of  
11 the legal and factual issues raised by my learned friends.

12 Let me hasten to say that the Prosecution adopts and  
13 incorporates, by reference, its submissions together with  
14 appendices and annexures pursuant to Rule 100(A) in respect of  
11:03:21 15 each accused that was filed on 24 August 2007.

16 I will endeavour to skim through the purpose and objectives  
17 of sentencing, My Lords, which are deterrence, retribution and  
18 rehabilitation.

19 In relation to deterrence within our context, it implies  
11:03:43 20 bringing to justice the individuals responsible for serious  
21 violations of International Humanitarian Law so as to deter  
22 future violation. The penalties imposed by this Chamber must, in  
23 general, have sufficient deterrent value to ensure that those who  
24 would consider committing similar crimes will be dissuaded from  
11:04:08 25 doing so, and one of the main purposes of sentencing at  
26 international tribunals level is to influence the legal awareness  
27 of the accused, the surviving victims, their relatives, the  
28 witnesses and the general public in order to reassure them that  
29 the legal system is implemented and enforced and, additionally,

1 the process of sentencing is intended to convey the message that  
2 globally accepted laws and rules have to be obeyed by everybody.

3 In the case of retribution, this should not be seen as a  
4 desire for revenge, but as a duly -- expression of the outrage of  
11:04:54 5 the international community at these crimes and, accordingly, a  
6 sentence of the international tribunal should make plain the  
7 condemnation of the international community of the behaviour and  
8 custom and show that the international community was not ready or  
9 is not ready to tolerate serious violations of International  
11:05:18 10 Humanitarian Law and Human Rights.

11 Rehabilitation, My Lords, has been deemed by the Appeals  
12 Chamber in the ICTY that, unlike domestic jurisdiction, even  
13 though relevant, but it cannot play a predominant role in the  
14 decision-making process of a Trial Chamber in an international  
11:05:36 15 criminal court when imposing sentence.

16 My Lord, with regards to reconciliation and restoration of  
17 peace, we should note that the United Nations Security Council  
18 Resolution 1315 of 14 August 2000 requested the Secretary-General  
19 of the United Nations to negotiate an agreement with the  
11:05:56 20 Government of Sierra Leone for the establishment of the Special  
21 Court and the Council had thus to say:

22 "In the particular circumstances of Sierra Leone a credible  
23 system of justice and accountability for the very serious  
24 crimes committed there would end impunity and would  
11:06:12 25 contribute to the process of national reconciliation and to  
26 the restoration and maintenance of peace."

27 It is the Prosecution submission, My Lords, that for the  
28 purpose of providing a credible system of justice and  
29 accountability, with a view to contributing to the process of

1 national reconciliation, and to the restoration and maintenance  
2 of peace, that cannot be achieved if the sentences imposed by the  
3 Special Court are not consistent with the community or with what  
4 the community would accept as a punishment fitting the crimes in  
11:06:46 5 question.

6 In other words, My Lord, we are seeking punishment that is  
7 commensurate with the offences that have been committed.

8 My Lord, I will move further to the factors in  
9 consideration when making a determination as regards sentencing.

11:07:02 10 One such factor is the gravity of the offence. It has been held  
11 by the ICTY Appeals Chamber that the gravity of the offence of an  
12 accused -- the gravity of an offence of which an accused is  
13 convicted is by far the most important consideration which may be  
14 regarded, and that it has been subject and described as a litmus  
11:07:25 15 test for the appropriate sentence.

16 In other words, it is a primary consideration or it should  
17 be the starting point when considering or making a determination  
18 on sentence.

19 What are the issues that one need to look at in making a  
11:07:41 20 determination with regards to the gravity of an offence? My  
21 Lord, we look at the number of victims, the impact of the crimes  
22 on the victim and others, the role of the accused in terms of his  
23 participation in the crime, and the individual circumstances of  
24 the accused.

11:08:00 25 Your Honours, pursuant to Article 19.2 of the Statute it  
26 directs the Trial Chamber in imposing a sentence to have regard  
27 to the individual circumstances of the convicted person. In  
28 relation to the sentencing factor, the individualisation of the  
29 sentence is not possible unless facts about the accused, about

1 the convicted person's personality is known, and this includes  
2 his background, his behaviour before and even during the offence,  
3 his motive of the offence and demonstration of remorse  
4 thereafter.

11:08:35 5 My Lord, in Rule 101(B)(i) it requires the Trial Chamber to  
6 consider any aggravating circumstance in determining an  
7 appropriate sentence. Only those circumstances directly related  
8 to the commission of the offence charged can be seen as  
9 aggravating.

11:08:53 10 To be taken into account by the Trial Chamber aggravating  
11 factors must be proven beyond reasonable doubt. Aggravating  
12 factors have been held to include, Your Honours, the status of  
13 the victims, the level of humiliation, degradation, depravity and  
14 sadistic behaviour of the accused, the pre-meditation and the  
11:09:16 15 breach of trust and the behaviour of the accused during the  
16 trial. These are factors to be considered when you make a  
17 determination as to the gravity -- as to the aggravation of the  
18 offences.

19 The Trial Chamber is also required to consider and give  
11:09:31 20 appropriate weight to any mitigating factors. The finding of  
21 mitigating circumstances may result in the reduction of a  
22 sentence that will otherwise have been imposed. Accepting the  
23 existence of mitigating factors, Your Honours, in no way  
24 derogates from the gravity of the crime. Mitigating factors may  
11:09:54 25 only be proven on the balance of probabilities and, My Lord, when  
26 you take into cognizance Rule 101(B), the Trial Chamber is  
27 specifically required to consider the substantial cooperation of  
28 the accused with the Prosecution. In this particular case there  
29 has been no substantial cooperation with the Prosecution from

1 either Fofana or Kondewa.

2 None of the accused have pled guilty and could have thereby  
3 saved this Court the time or the distress caused to the witnesses  
4 who were forced to relive their terrible ordeals.

11:10:31 5 Your Honours, matters that may be taken into account as  
6 mitigating factors would include issues such as diminished mental  
7 responsibility which is not before this Court, involuntary  
8 intoxication - no iota of evidence is before this Court - duress  
9 or superior orders, or forced participation in the crime.

11:10:52 10 And, Your Honours, having skimmed through the statement of  
11 the law on sentencing, the Prosecution will now exclusively focus  
12 attention on the specific case of each accused and the arguments  
13 raised in their sentencing submissions.

14 I will start with the accused Fofana.

11:11:11 15 Fofana has been found guilty of war crimes of violence to  
16 life, health and physical or mental well-being of persons, in  
17 particular murder under count 2, cruel treatment under count 4,  
18 pillage under count 5, and collective punishment under count 7.  
19 These crimes were deliberate, unprovoked, brutal, and committed  
11:11:39 20 against unarmed civilians including men, women and children.

21 The main determinant to an evaluation of an appropriate  
22 sentence rests on the circumstances of the crime with which the  
23 accused has been found guilty and his role therein. Fofana was  
24 specifically found guilty pursuant to Article 6.1 of the Statute  
11:12:04 25 for aiding and abetting various murders totalling 120 victims;  
26 acts of cruel treatment and collective punishments that occurred  
27 in January and February of 1998 in and around the town of Tongo.

28 The Prosecution would submit that within the context the  
29 aiding and abetting is a direct form of participation in the



1 commission of the crimes.

2 Secondary or indirect participation is at the 6(3) level of  
3 command responsibility. My Lords, if even ex-arguendo, the Trial  
4 Chamber is minded to treat aiding and abetting as an indirect  
11:12:50 5 crime, it should be noted that the mere fact that an accused is  
6 found guilty as an indirect perpetrator does not in itself  
7 entitle him to a lower sentence since the role of the indirect  
8 perpetrators can be very significant, particularly in cases of  
9 large-scale crimes which cannot be committed without the help of  
11:13:12 10 the indirect perpetrators in such ways as planning, instigating,  
11 aiding and abetting, co-ordinating or organising. And, My Lords,  
12 such is the scenario in Fofana's case. His substantial support  
13 and his proximity to the offences that have been committed can be  
14 seen and related and be described as direct participation in an  
11:13:31 15 offence.

16 My Lords, the Trial Chamber will recall that Kamajors  
17 committed horrific crimes. Fofana has been held responsible for  
18 many of these crimes, including the murder of a 12-year old boy  
19 named Foday Koroma in Tongo, who was killed by the Kamajor  
11:13:54 20 commander named Kamabote, simply because he was related to a  
21 rebel in Tongo. My Lords, that is the offence he committed and  
22 that is why he was killed, and the Trial Chamber has held Fofana  
23 responsible under 6.1 for that charge.

24 Your Honours, the Trial Chamber also held Fofana criminally  
11:14:28 25 responsible, pursuant to Article 6.1, for the murders of one  
26 Dr Blood and a woman named Fatmata Kamara at the NDMC  
27 headquarters in Tongo on 14 January 1998. Both were killed  
28 because they were considered to be collaborators. On the mere  
29 suspicion of being a collaborator that signifies a death warrant.

1 I am reminded of Shakespeare in Julius Caesar, in the scene  
2 regarding Cinna the poet. Cinna, a publican, was met by the mob,  
3 and when he was accosted and asked his name he said, "I am Cinna,  
4 the poet," and they were really searching for Cinna, the senator,  
11:15:14 5 and he was killed and I recall them saying [speaks Latin]. My  
6 Lord, those were his [indiscernible]. But those were the days of  
7 mob justice. International criminal law today has moved away  
8 from that and we are putting a stop to such actions and in this  
9 scenario, My Lord, the mere fact and suspicion of you being a  
11:15:31 10 collaborator you have signed your death warrant.

11 The factual finding of this Trial Chamber on the evidence  
12 surrounding the Kamajor attack on Tongo, particularly the NDMC  
13 headquarters, is proof of the hideousness of the conduct of the  
14 Kamajors acting under the orders of Fofana.

11:15:48 15 He has also been held criminally liable for the deaths of  
16 64 civilians at Kamboma. Your Honours will recall the evidence.  
17 Civilians running away from the Tongo attack were ordered to make  
18 a long line when they got to the Kamboma checkpoint. They were  
19 separated into several lines and hacked to death, one after the  
11:16:15 20 other.

21 My Lord, the witness has to relive his testimony before  
22 this Court. He was the 65th person on the line, the last man on  
23 the line. He was hacked on the neck and rolled over onto the  
24 swamp and left for dead but he survived to narrate his ordeal to  
11:16:36 25 this Court and to the world in general and this Court has found  
26 that Fofana had a substantial contribution to that criminal act  
27 and, My Lord, the Prosecution therefore invites the Trial Chamber  
28 to impose a sentence commensurate to the substantial role played  
29 by Fofana in the perpetration of this event.

1 My Lord, the Fofana Defence underscored the point, in their  
2 paragraph A -- 3A to C, that he was not physically present when  
3 most if not all of the offences for which he was convicted were  
4 committed. My Lord, the Prosecution submits it is trite law that  
11:17:19 5 an accused need not be present on the crime scene for a safe  
6 conviction or for a sentence to be lessened. It is the extent of  
7 the form of participation that is crucial under the  
8 circumstances. And it is settled that a superior, from a  
9 distance, can bear greater responsibility than the lower rank  
11:17:42 10 individual on the spur of the moment.

11 My Lord, the issue here for consideration is the  
12 effectiveness of the role of the accused rather than his physical  
13 presence on the scene of the crime.

14 Fofana, as a superior, pursuant to Article 6.3, has been  
11:18:02 15 held to be criminally responsible for the deaths of 17 innocent  
16 civilians in Koribundu. The Trial Chamber also convicted  
17 [indiscernible] Fofana, pursuant to Article 60 again, for crimes  
18 of cruel treatment and collective punishment for the acts of  
19 Kamajors in Koribundu, and it is a finding of this very Court  
11:18:27 20 that Fofana had effective control over these Kamajors. Effective  
21 control over these Kamajors. And, as such, his physical presence  
22 or absence in the crime scene, at the time of the commission, is  
23 of no material consequence to determining the sentence to be  
24 imposed by this Trial Chamber, as long as it has been found that  
11:18:53 25 he exercised that effective control over his subordinates.

26 The Trial Chamber has also found, beyond reasonable doubt,  
27 that Fofana, as a superior, is individually criminally  
28 responsible for the crimes of murder, cruel treatment, pillage  
29 and collective punishment committed in the Bo District.

1           The Fofana Defence has canvassed the argument in paragraph  
2 11 to 12 that crimes committed through indirect or secondary  
3 modes of liability, such as aiding and abetting, and command  
4 responsibility, warrant considerable lower sentences than that  
11:19:37 5 reserved for the principal or co-perpetrators. The Prosecution  
6 reiterates its position earlier that aiding and abetting is a  
7 form of direct participation. In particular, an ongoing failure  
8 by a superior to exercise the duties to prevent or punish, with  
9 its implicit effect of encouraging subordinates to believe that  
11:20:00 10 they can commit further crimes with impunity must be regarded as  
11 being of significantly greater gravity than isolated incidence of  
12 such a failure.

13           In the Blaskic case, that Trial Chamber went so far as to  
14 hold that if a commander fails in his duty to prevent the crime,  
11:20:20 15 or to punish the perpetrator thereof, he should receive a heavier  
16 sentence than the subordinates who committed the crimes. Insofar  
17 as the failing conveys some tolerance, or even approval on the  
18 part of the commander towards the commission of crimes by  
19 subordinates, and thus contributes to the encouraging of the  
11:20:41 20 commission of the new crimes, it would not, in fact, be  
21 consistent to punish a simple perpetrator with a sentence equal  
22 or greater to that of a commander, and that was the position of  
23 Fofana; the position of a commander.

24           My Lord, the Appeals Chamber of the ICTR has accepted the  
11:21:02 25 principle, consistent with the case law of the ICTY, that the  
26 most senior members of a command structure, that is its leaders,  
27 the planners of a particular conflict, should bear heavier  
28 criminal responsibility than those lower down the scale, such as  
29 the foot soldiers carrying out the orders, but this principle has

1 always been subject to a crucial proviso, My Lord, I must  
2 concede, that the gravity of the offence is a primary  
3 consideration and we submit in this instance that the gravity of  
4 the offences committed by Fofana warrant an imposition of a  
11:21:40 5 sentence cognisant of that gravity and, indeed, it's a heavy,  
6 heavy consequence, My Lord.

7 Even the case relied on by the Defence in support of their  
8 proposition, the Krstic appeal judgment, is not quite helpful to  
9 their cause. That court cited the following phrase: That a  
11:21:57 10 person who premeditatedly aided another person in perpetration of  
11 a criminal act would be punished as if he had committed it. His  
12 sentence can also be reduced. My Lord, the important words of  
13 note in that area is that "A sentence can also be reduced."

14 We should note, My Lord, that it is not mandatory, as seems  
11:22:22 15 to be suggested by the Defence; his sentence can be reduced. It  
16 is not automatic that if you are a commander, and that a junior  
17 or lower rank officer commit an offence and upon conviction it is  
18 not automatic for a lesser punishment or lesser sentencing. What  
19 it says: His sentence can be reduced. I mean, let me go  
11:22:50 20 further. And, in fact, in that very same case the Prosecution  
21 requested a minimum of 30 years' imprisonment, similar to what  
22 the Prosecution is requesting in this present case.

23 PRESIDING JUDGE: I was going to say so.

24 MR KAMARA: Yes, My Lord.

11:23:04 25 PRESIDING JUDGE: You appear to have been inspired by that,  
26 you know.

27 MR KAMARA: Yes, My Lord. They brought the case up and I  
28 looked it up.

29 PRESIDING JUDGE: Go ahead.

1 MR KAMARA: Yes, My Lord.

2 JUDGE BOUTET: What is your reference, if you can?

3 MR KAMARA: For Krstic?

4 JUDGE BOUTET: Yes.

11:23:14 5 MR KAMARA: My Lord, it's the very same reference.

6 JUDGE BOUTET: No, but the phase --

7 MR KAMARA: The phase, it's -- I think it's paragraph 275.

8 It should be about the last two paragraphs in that judgment, the

9 appeal's judgment, My Lord. Krstic, I think it's paragraph 275.

11:23:27 10 I do remember it. And, however, the sentence imposed by the

11 Appeals Chamber was 35 years; 35 years for aiding and abetting.

12 PRESIDING JUDGE: Notwithstanding the fact that the

13 Prosecution has asked for --

14 MR KAMARA: I'd asked for 30, My Lord. My Lord, if that is

11:23:44 15 what the Defence wants, so be it. My Lord, the Fofana Defence,

16 in paragraph 23 of their brief, maintain that with respect to

17 Fofana's liability under 6.3, for failure to commit -- for

18 failure to prevent crimes in Koribundu and Bo, the Trial Chamber

19 did not find that Fofana had actual knowledge of their commission

11:24:05 20 but, rather, that such knowledge could have been reasonably

21 inferred from Norman's illegal order: Speak no ill of the dead.

22 And, accordingly, Fofana's crimes in that regard must be

23 considered relatively less grave. My Lord, nothing could be as

24 far away from the truth than that assertion.

11:24:29 25 The Trial Chamber, in its judgment in paragraph 777 -- I am

26 reminded of a casino by that number, My Lord, and just this

27 morning we were told that OJ Simpson has been charged for armed

28 robbery in Las Vegas -- and, My Lord, coming back to the scene,

29 at paragraph 777, the Trial Chamber clearly stated, 777, three

1 sevens My Lord, as in a slot machine -- I see the learned  
2 Prosecutor is enjoying himself in referring to the slot  
3 machine --

4 JUDGE BOUTET: I am not sure I follow you about the  
11:25:10 5 relationship.

6 MR KAMARA: On the slot machine? 777?

7 JUDGE BOUTET: Yes. I fail to follow you on this, but,  
8 anyhow --

9 MR KAMARA: Yes, My Lord. Well, having visited Las Vegas,  
11:25:16 10 we are familiar with these figures.

11 JUDGE BOUTET: I am not.

12 PRESIDING JUDGE: I hope you came out of it a millionaire.

13 MR KAMARA: Not at all, My Lord. I really want to --

14 PRESIDING JUDGE: Manipulating the machines.

11:25:30 15 MR KAMARA: I went there once, I never made it again.

16 Coming to the reality of the situation, and in all  
17 seriousness, My Lord, at paragraph 777 the Trial Chamber clearly  
18 stated that Fofana knew that the attacks on Koribundu would  
19 involve the commission of the criminal acts by Nallo, Joe

11:25:51 20 Tami dey, Borbor Tucker, Lamin Ngobeh and other commanders. This  
21 misrepresentation I will consider as an error and not as a  
22 deliberate attempt to distort the facts, but the truth of the  
23 matter is Fofana had actual knowledge and therefore must receive  
24 a sentence consistent with the possession, or someone with the  
11:26:11 25 possession of such knowledge and failing to prevent the  
26 perpetrated offences.

27 My Lord, the Fofana Defence [Indiscernible] articulated as  
28 mitigating factor the assistance provided by Fofana in terms of  
29 procuring and supplying of food, be it Kamajors or at large

1 anyone else -- I will give them that benefit. The fact the  
2 accused gave substantial assistance or protection to vulnerable  
3 individuals, or saved lives, might constitute a mitigating  
4 factor; might.

11:26:46 5 However, the ICTY Appeals Chamber has made it clear that  
6 selective assistance is less decisive when one notes that  
7 criminals frequently show compassion for some of their victims  
8 even when perpetrating the most heinous crimes.

9 The jurisprudence on selective assistance is consistent and  
11:27:08 10 little if any weight should be given to this factor and, My Lord,  
11 the overriding aim of a sentencing which we should look at in  
12 terms of making a determination is the gravity of the offence. I  
13 will always be coming to that: The gravity of the offence. If  
14 the gravity of the offence is such that whatever selective  
11:27:29 15 assistance that may have been provided will be of no  
16 significance.

17 It has also been argued by the Defence of Fofana and  
18 Kondewa in this particular instance that the lack of formal  
19 military training and/or education is to be considered as a  
11:27:46 20 mitigating factor and hence a lesser punishment for the crimes  
21 for which they have been convicted.

22 My Lord, both accused persons' lack of formal education  
23 cannot be considered a mitigation. One does not have to be  
24 formally educated to know that killing an innocent civilian is an  
11:28:07 25 offence.

26 It is both legally and morally wrong to kill, and it is  
27 cited that Fofana is a Muslim and it is also there in the Koran:  
28 It is wrong to kill a fellow man. So, My Lord, be you formally  
29 educated or not, a wrong is a wrong. It does not exculpate both



1 accused persons in this incident. Neither the ICTY nor the ICTR  
2 has recognised the lack of formal education as a mitigating  
3 factor.

11:28:48

4 And, My Lord, in the particular case of Kondewa, he had  
5 been quoted to say at one point in time in Talia, when he was  
6 being accosted by the members of the War Council, when he said:  
7 We say war, you say book, meaning that when we talk about  
8 fighting you are bringing issues of education. He cannot turn  
9 around now and want to seek refuge under an umbrella of his lack  
10 of education, formal education.

11:29:09

11 Your Honours, the Fofana Defence argued in paragraph 30  
12 that certain Trial Chambers have recognised the difficult  
13 circumstances under which a convicted person was required to  
14 operate as a basis for mitigation of sentence.

11:29:29

15 Indeed, Your Honours, it is conceded that the circumstances  
16 under which all the warring factions operated were difficult. We  
17 concede to that, that circumstances were difficult but, in this  
18 particular case, it is inexcusable for armed factions to attack  
19 innocent civilians in reckless disregard of the consequences and  
20 claim that it is as a result of the difficult circumstances.

11:29:53

21 However difficult a situation might be it is still no  
22 excuse to kill unarmed innocent civilians and that is the very  
23 charge against the two accused persons. They are not here for  
24 killing rival armed groups in the hot pursuit of hostilities.  
25 They are here for the killing of innocent unarmed civilians.

11:30:16

26 And, My Lords, the CDF were looked upon as protectors.

27 My Lord, for these two accused persons to have been in a  
28 vantage, advantaged position, and utilised that position for them  
29 and their commanders to turn their own weapons on their very own

1 people, My Lord, no difficult circumstance will amount to an  
2 excuse for the killings of those innocent civilians.

3 The killings for which both accused have been convicted  
4 were not accidental or part of a collateral damage. The evidence  
11:30:54 5 shows that the victims were particularly targeted with the  
6 primary purpose and the specific intent to punish the civilian  
7 population, it was made clear in the Koribundu attack and in the  
8 Tongo attacks. And, furthermore, My Lords, not even the fact of  
9 the existence of a chaotic situation at the time of the  
11:31:15 10 commission of the offences would relieve liability for  
11 international war crimes.

12 If this Court were today to grant an excuse under the  
13 rubric of difficult circumstances, My Lord, every war is a  
14 difficult circumstance and every offence will go unpunished. The  
11:31:34 15 crimes for which Fofana has been convicted were committed  
16 largely, Fofana and Kondewa, were committed largely against an  
17 unarmed civilian population and clearly, clearly non-chaotic  
18 circumstances. There are occasions, as the evidence has shown,  
19 the victims know the perpetrators well. They lived in the same  
11:31:55 20 village. It was not under an attack. This ground of mitigation  
21 is therefore not open to Fofana, neither Kondewa. And  
22 furthermore, even if such circumstances did exist, the  
23 jurisprudence in this area states that the existence of a chaotic  
24 environment is not a mitigating factor.

11:32:18 25 And additionally, even the Trial Chamber II found that the  
26 battlefield is always chaotic and, therefore, this factor cannot  
27 be considered as mitigating. My Lord, I invite you to join your  
28 brothers in making similar findings. While --

29 PRESIDING JUDGE: We only have one brother there.

1 MR KAMARA: Oh yes, My Lord. Thank you, My Lord. There  
2 are no women at the Bar. Thank you, My Lord.

3 PRESIDING JUDGE: I mean, you are inviting us to join our  
4 brother and our sister. Thank you.

11:32:52 5 MR KAMARA: Yes, My Lord. Thank you.

6 While the CDF, largely the Kamajors, may have been fighting  
7 for the restoration of democracy in Sierra Leone, we do concede  
8 to that fact, no argument, but this cannot override individual  
9 responsibility for war crimes, nor provide again an umbrella  
11:33:13 10 under which the perpetrators of war crimes can seek refuge or  
11 plead mitigation of sentence after being convicted for  
12 international war crimes. The purpose for fighting will not  
13 exculpate your criminal liability.

14 Fofana and Kondewa were convicted of killing unarmed  
11:33:33 15 innocent civilians, including women and children who were  
16 punished only because in some way they were thought to be  
17 associated with the enemy. Allowing for mitigation in sentence  
18 on this basis, that the convicted persons were fighting on the  
19 side of the government on or restoring democracy would only send  
11:33:53 20 the message that International Humanitarian Law does not have to  
21 be followed by all sides in an armed conflict. The Prosecution  
22 is saying all is equal before the law.

23 Now, what is the specific role of Fofana in the general  
24 scheme of things within the CDF as it relates to the crimes for  
11:34:18 25 which he has been convicted.

26 Your Honours, the role and participation of Fofana shows  
27 that he was not an unwilling participant but, rather, I would  
28 describe him as a pioneer, an aggravator of the violence. A  
29 pioneer, an aggravator of the violence. Most of the crimes again

1 were deliberate, unprovoked, brutal and committed against unarmed  
2 civilians including, always including men, women and children,  
3 the intention of which was to kill, burn, loot and collectively  
4 punish the civilian population. These crimes were heinous. They  
11:34:57 5 targeted very large numbers of unarmed civilians and had a  
6 devastating and irreversible impact on the lives of the victims  
7 and their families.

8 The Trial Chamber ruled that Fofana in his capacity as  
9 Director of War of the CDF at Base Zero planned, executed war  
11:35:19 10 strategies, received -- even though the planning, the Trial  
11 Chamber cleverly mentioned, that it did not include criminal  
12 acts -- but he received frontline reports from commanders and,  
13 additionally, Fofana selected commanders to go to battle and  
14 could on occasion issue direct orders to these commanders. For  
11:35:40 15 example, he issued an order to Joe Tamidey, the battalion  
16 commander for Koribundu, not to release any captured vehicles and  
17 other items to any person until they were registered with the CDF  
18 headquarters. He cannot deny his authority.

19 And, Your Honours, there is overwhelming evidence which was  
11:35:58 20 presented before this Court that Fofana was responsible for the  
21 receipt and provision of ammunitions at Base Zero. Even Defence  
22 witnesses acknowledged this role and at a point admitted that he  
23 was a storekeeper of some sort.

24 Fofana played an essential role in the CDF organisation.  
11:36:20 25 He received frontline reports. Such reports would go through him  
26 before ultimately reaching the late Norman. He was at a vantage  
27 position to understand and been well-informed of Kamajor  
28 activities and locations. If he had wanted to take any action he  
29 could have but he failed to do so and at Base Zero a situation

1 report, dated 16 November 1997, that was prepared by TF2-079 was  
2 presented to Fofana. It narrated crimes which were committed by  
3 Kamajors in the Lower Bambara and Dodo Chiefdoms.

4 Arms and ammunitions were requested and attacks which had  
11:37:04 5 been launched in the area were described and even the  
6 extrajudicial killing of Paul Danema was contained in that  
7 report. Fofana was also seen as having clear power and authority  
8 at Base Zero and was one of the overall bosses of the commanders.  
9 The Trial Chamber held that Fofana encouraged, supported the  
11:37:27 10 Kamajors in their actions in consequence of which they committed  
11 acts of killing and infliction of physical suffering or injury in  
12 Tongo.

13 Your Honours, at this juncture let us not forget, again,  
14 the gravity of the offences for which he has been convicted. I  
11:37:47 15 will draw another example.

16 On 14 January 1998 Kamajors took witness TF2-048's uncle,  
17 an unidentified woman, an unidentified child behind a house at  
18 the NDMC headquarters in Tongo. After a while they returned with  
19 blood on their machetes and these people have never been seen  
11:38:12 20 again.

21 The killings were indiscriminate. Innocent civilians,  
22 women and children, were not spared. This Chamber convicted  
23 Fofana for aiding and abetting those killings and also the  
24 killings of 20 men on 15 January 1998, who had been accused of  
11:38:33 25 being rebels, all during the Tongo attack. These men were hacked  
26 to death with machetes at the NDMC headquarters in Tongo. What  
27 better example can there be of blatant disregard for the value of  
28 human life exhibited by these perpetrators who were aided and  
29 abetted by Fofana.

1           And in spite of the glaring presence of a large number of  
2 civilians in the Tongo area these perpetrators continued their  
3 killings unabated. The Trial Chamber will recall the evidence of  
4 TF2-022. The perpetrators at one point in time, at the  
11:39:12 5 checkpoint, hacked to death one man for carrying a photograph of  
6 a rebel. The mere possession of a photograph of a rebel resulted  
7 in his death. My Lord, there is something far more worse than  
8 that.

9           In the same scenario, moving from that checkpoint to  
11:39:31 10 another checkpoint ahead, a boy named Suli [phon] was hacked to  
11 death. And what is the reason for that? He carried a wallet  
12 that resembled SLA fatigues. It is clear amongst the youths  
13 these wallets are carried by so many people. Little did Suli  
14 realise that he had an [indiscernible] death warrant. My Lord,  
11:39:57 15 these are the kind of scenes, these are the kind of crimes this  
16 Court had cause to listen to and for which Fofana has been found  
17 guilty.

18           Your Honours, I will now move on to consider the  
19 aggravating factors that are applicable to Fofana. The  
11:40:13 20 Prosecution submit there are significant aggravating  
21 circumstances in his case. To start with, he breached his  
22 position of authority and trust. Trust, Your Honours, once lost  
23 will never be regained.

24           My Lord, we submit, and more significantly, that an  
11:40:38 25 accused's responsibility or influence in the community is the  
26 degree to which he can be said to be acting in breach of that  
27 trust within that community. The trust bestowed on Fofana, a  
28 former chiefdom speaker, a community elder and the CDF National  
29 Director of War was enormous and his betrayal of his people

1 should be considered extremely aggravating.

2 As their leader, Fofana was entirely trusted by his  
3 subjects and those that rallied around him for security reasons.  
4 These are the very people that turned out to be the victims. He  
11:41:20 5 was a member of the War Council and, as such, was entrusted with  
6 helping the security and wellbeing of those people in Talia and  
7 the surrounding villages. Even the Defence witnesses  
8 acknowledged the respect and awe that was attached to Fofana.  
9 His own brother-in-law could not get close to him for fear.

11:41:42 10 Your Honours, the attacks on civilians in Tongo and in  
11 Koribundu, on the instructions of and support of Fofana betray  
12 the trust of his people. This was clearly manifested in the  
13 Koribundu meeting where the late Norman scolded the Kamajors for  
14 not having done their work he had told them to do and, in  
11:42:04 15 particular, to destroy all houses except three.

16 Your Honours, the witnesses that attended that meeting left  
17 feeling very disappointed in the CDF leadership. Fofana betrayed  
18 his constituents with unbelievable cruelty and that breach of  
19 trust in his case is seriously aggravated.

11:42:28 20 Another factor for consideration, Your Honours, is the  
21 vulnerability of the victims. The victims were mostly civilians,  
22 including women and children. The young and the old were not  
23 spared. All these victims were in an extreme position of  
24 vulnerability and helplessness. The Trial Chamber found that  
11:42:53 25 individuals were intentionally killed. In the majority of the  
26 cases they were specifically targeted because of the  
27 perpetrators' belief that they were collaborators or rebels.

28 PRESIDING JUDGE: Mr Kamara, most of these submissions we  
29 note are written. You are coming back on them, you know. We are

1 worried, you know, about that because we did say that we have  
2 taken note of most of these submissions which are already in your  
3 brief.

4 MR KAMARA: Yes.

11:43:24 5 PRESIDING JUDGE: I know you must have prepared another  
6 brief and you have already taken 40 minutes. I am sure if you  
7 followed our directives, maybe you would have been done by now.  
8 So you may proceed, please. I just thought I should remind you  
9 because -- we have been following you very attentively.

11:43:49 10 MR KAMARA: Yes, My Lord. Thank you very much, My Lord.  
11 These are isolated cases that I am just highlighting for the  
12 Bench and for those that may not have the opportunity to read the  
13 brief. My Lord, I will proceed. Thank you, My Lord.

14 JUDGE BOUTET: Along the same lines, Mr Kamara, you have  
11:44:09 15 one hour to deal with both Fofana and Kondewa so you have more  
16 than 40 minutes it seems already so --

17 MR KAMARA: Yes, My Lord. It's intentional because  
18 Kondewa's is less than five minutes. My Lord, you know exactly  
19 where I am leading to. All right.

11:44:30 20 PRESIDING JUDGE: We are yet to see. Go ahead, please.

21 MR KAMARA: Fofana in his sentencing brief has raised  
22 multiple mitigating and personal circumstances. My Lords, it's  
23 the Prosecution's submission that no recognised mitigating  
24 circumstance is applicable to Fofana's case. He need not plead  
11:44:52 25 guilty nor cooperated with the Prosecution, and neither has  
26 issued any form of remorse since the day he started coming to  
27 this Court. There is no evidence --

28 PRESIDING JUDGE: Why should an accused plead guilty when  
29 he is convinced he is not guilty?



1 MR KAMARA: My Lords, it's one of the requirements for  
2 mitigation so --

3 PRESIDING JUDGE: It's a very controversial requirement.

4 MR KAMARA: Yes.

11:45:17 5 PRESIDING JUDGE: Because accused persons who believe very,  
6 very convincingly in their innocence are not supposed to plead  
7 guilty.

8 MR KAMARA: Correct, My Lord, from the point of  
9 jurisprudence it could be controversial.

11:45:29 10 PRESIDING JUDGE: It is controversial. I say it is. Not  
11 could. It is controversial.

12 MR KAMARA: Yes, My Lord.

13 PRESIDING JUDGE: You may proceed, please.

14 MR KAMARA: Thank you, My Lord. And at no point in time,  
11:45:37 15 as I said, showed any form of remorse. And there is no evidence  
16 that Fofana committed these crimes under any duress or that he  
17 was not in a voluntary or willing -- that he was not a voluntary  
18 or willing perpetrator of the crimes. Indeed, as I have argued  
19 earlier, he was a prime mover of their commission.

11:45:57 20 Contrary to the Defence submissions there is not an iota of  
21 evidence to suggest that Fofana acted pursuant to superior orders  
22 to commit the crimes for which he has been convicted. The fact  
23 that an accused reiterated orders previously issued by a superior  
24 cannot be considered in mitigation.

11:46:17 25 The Defence credits Fofana with representing the CDF at  
26 various workshops and other peace-building activities. However,  
27 no evidence was led at trial to show what he actually did and  
28 what role he played. In the absence of such evidence any such  
29 activities cannot be regarded as conduct demonstrating an attempt

1 to make amends or to atone for his crimes.

2 In any event, Trial Chamber II found that alleged acts of  
3 philanthropy and alleged involvement in the commission for the  
4 consolidation of peace are not mitigating factors. Again, Your  
11:46:53 5 Honours, I invite you to join your brother and sisters of  
6 Trial Chamber II and make a finding accordingly.

7 In particular, given the gravity of the crimes for which  
8 Fofana has been convicted, and such activities should be accorded  
9 very little if any weight in mitigation. The Defence will, of  
11:47:14 10 course, through their annexures, canvass the issue of good  
11 character of Fofana.

12 Your Honours, the Prosecution submit that evidence of one's  
13 good character does not trigger an automatic mitigation. The  
14 gravity and aggravation with which the offences were committed  
11:47:28 15 clearly overwhelm any doubt, clearly overwhelm any doubt that may  
16 be cast upon the good character of the accused.

17 The Appeals Chamber in the Celebici case has said that  
18 evidence as to character of the accused has been considered both  
19 in mitigation and aggravation. It has been suggested that the  
11:47:50 20 good background of an accused may aggravate more than mitigate,  
21 since for a person of good background to commit serious offences  
22 it requires an even greater evil will on his part than that for  
23 the lesser men.

24 Finally, My Lord, on Fofana. The Prosecution submit that  
11:48:11 25 in the case of gravity no significance of weight can be given to  
26 considerations such as the accused's age or family background or  
27 the fact that an accused has no previous conviction or he is the  
28 father of young children. Fofana is a husband. So too were the  
29 victims, one of whose wives had to witness his death at the hands

1 of Kamajors under the control of Fofana. Fofana is a father, so  
2 too were some of his victims, some of whose children had the  
3 misfortune to see their father killed in front of their own very  
4 eyes at a tender age.

11:48:49 5 My Lord, I will now move on to Kondewa.

6 JUDGE BOUTET: Mr Kamara, just before you do, I would just  
7 like to get some clarification on two matters that you have  
8 touched upon.

9 MR KAMARA: Yes.

11:48:58 10 JUDGE BOUTET: One is, you've mentioned that the accused  
11 Fofana was a member of the War Council.

12 MR KAMARA: Yes.

13 JUDGE BOUTET: To my recollection, and I just looked very  
14 quickly to the judgment, I don't think we made any such finding  
11:49:10 15 but maybe my memory is not accurate this morning on this issue  
16 but they did play a role, but I don't think there was any finding  
17 that --

18 MR KAMARA: Finding that he was a member of the War  
19 Council.

11:49:21 20 JUDGE BOUTET: -- they were members of the War Council. I  
21 just want to clarify that so, as I say, this is my recollection  
22 but I will check the record on this.

23 The other issue is you have in your submission made the  
24 prior statement that their actions, the action of -- they were  
11:49:43 25 directed to the civilian population, they were the target of, and  
26 therefore the victims were not to be considered to be collateral  
27 damage.

28 We have made a very clear finding that there were no  
29 evidence sufficient, beyond reasonable doubt, that the civilian

1 population was a primary target of the attacks and this is why we  
2 found all accused not guilty of crimes against humanity. So this  
3 language you use is a language that is consistent with crimes  
4 against humanity not war crimes.

11:50:20 5 MR KAMARA: Yes.

6 JUDGE BOUTET: So I want to make sure that you are not  
7 misstating the facts and that you are directing your comments to  
8 those counts for which we found them guilty.

9 MR KAMARA: Yes, My Lord. At the opening I directed the  
10 attention of the Bench to the war crimes. And firstly, on the  
11 issue of the membership of the War Council, My Lord, I cannot off  
12 the cuff now make a statement on the judgment as it is, but if it  
13 were the case, My Lord, assuming you are right My Lord, you can  
14 disregard that statement. But, My Lord, with the second aspect

11:50:53 15 of your observation about collateral damage, the use of the words  
16 there "targeting civilians" was meant with regard. It is the  
17 subject of the predicate of the collateral damage. I wasn't  
18 referring to the target of civilians within the context of crimes  
19 against humanity. I was referring to them that civilians

11:51:14 20 targeted as a collateral damage and, as such, My Lord, for you to  
21 consider it under the crimes against humanity and, as I was  
22 skimming through, maybe I did not make myself quite explicit, but  
23 I agree with you that issues -- the Court made a finding that  
24 civilians were not the direct target. I agree and I take that --

11:51:31 25 I take it in good stead. I wasn't referring to civilians as a  
26 specific target in the sense of crimes against humanity but in  
27 pursuit of war crimes that it did not even constitute collateral  
28 damage.

29 JUDGE BOUTET: That is fine. Thank you.

1 MR KAMARA: Thank you, My Lord.

2 Your Honours, Kondewa has been found guilty for war crimes  
3 of violence to life, health and physical or mental well-being of  
4 persons, in particular murder, under count 2; cruel treatment  
11:51:59 5 under count 4; pillage under count 5; collective punishments  
6 under count 7; and use of child soldiers under count 8. These  
7 crimes again were deliberate, unprovoked, brutal and committed  
8 against unarmed civilians.

9 Your Honours, the Kondewa sentencing brief, with due  
11:52:17 10 respect to my learned friends, especially Mr Yada Williams in  
11 this case, is more an appellate brief in form and in substance.  
12 My Lord, that is why initially I said I wouldn't spend much time  
13 on it. It's more an appellate brief in form and in substance.  
14 The Kondewa Defence is still in denial that the Trial Chamber has  
11:52:37 15 convicted Kondewa for war crimes under counts 2, 4, 5, 7 and 8.

16 PRESIDING JUDGE: I couldn't agree with you more.

17 MR KAMARA: Thank you, My Lord. And, My Lord, I wouldn't  
18 want to go into all the issues that they raised by way of  
19 challenging the judgment. I would rather summarise them so that  
11:52:58 20 the Trial Chamber can see clearly why I wouldn't bother with  
21 addressing those issues. The Kondewa brief challenging the trial  
22 judgment that there is lack of evidence to prove beyond  
23 reasonable doubt the charges for which Kondewa has been found  
24 guilty, end of paragraph 2 --

11:53:11 25 PRESIDING JUDGE: The Chamber would not want you to address  
26 those issues.

27 MR KAMARA: Thank you, My Lord. I wouldn't bother.

28 PRESIDING JUDGE: Any issue that contests the finding of  
29 this Court, a finding of guilt in this Court, should not be the

1 subject matter of the proceedings at this point in time.

2 MR KAMARA: Very well, My Lord. We agree with you and the  
3 Prosecution will levitate itself above that approach and move on  
4 to address other issues in mitigation that they've raised, other  
11:53:38 5 than the main thrust of challenging the jurisdiction, the  
6 judgment.

7 PRESIDING JUDGE: But in that brief, issues have been  
8 raised.

9 MR KAMARA: Yes, My Lord.

11:53:55 10 PRESIDING JUDGE: Issues in mitigation have been raised.

11 MR KAMARA: Yes, My Lord.

12 PRESIDING JUDGE: You can address us on those.

13 MR KAMARA: That is why I am trying to skim through.

14 PRESIDING JUDGE: And leave the appellate arguments aside  
11:54:03 15 which are for some other jurisdiction somewhere. We are not  
16 sitting on appeal on our own decision here.

17 MR KAMARA: My Lord, you are speaking as if you are reading  
18 my brief in front of me. Those are the exact words I have.

19 PRESIDING JUDGE: Well, we happen to have the same type of  
11:54:20 20 training, maybe.

21 MR KAMARA: Thank you, My Lord.

22 Let me turn to the role of Kondewa in the general scheme of  
23 things in the CDF. Kondewa is a High Priest of the CDF  
24 organisation. He was in charge of the initiations at Base Zero  
11:54:40 25 and other places and was the leader of all initiators throughout  
26 Sierra Leone.

27 PRESIDING JUDGE: And a man who does what he says.

28 MR KAMARA: Oh, yes, that is what it means, Kondewa. If he  
29 says this, he will do it.

1 PRESIDING JUDGE: He will do it.

2 MR KAMARA: Yes, My Lord. Thanks for the reminder.

3 PRESIDING JUDGE: That was just a diversion; sorry about  
4 this.

11:54:58 5 MR KAMARA: Welcome.

6 As this Trial Chamber has heard that the late Norman,  
7 Fofana and Kondewa were the key and essential components of the  
8 leadership structure of the organisation. They were the  
9 executives of the CDF and actually taking decisions while nobody

11:55:17 10 else could take a decision in their absence. They were the

11 leaders of the CDF and all the Kamajors looked up to them.

12 Kondewa specifically was essential to the CDF organisation

13 because Kamajors looked up to him and believed that he could

14 protect them from harm. Ultimately, no Kamajor will go to war

11:55:36 15 without Kondewa's blessings.

16 Kondewa, along with others, made strategic war decisions

17 determining when and where to go to war; trial judgment paragraph

18 721. Following the passing out parade at Base Zero in December

19 1997, Kondewa told the fighters that the time for surrender of

11:55:58 20 rebels had long exhausted and that they did not need any

21 surrounded rebels and Kondewa was present at, and participated in

22 the discussions at subsequent meetings where plans for the attack

23 on Tongo were discussed.

24 The Trial Chamber held that Kondewa supported and

11:56:18 25 encouraged Kamajors through speeches and blessings to kill

26 captured enemy combatants and collaborators to inflict physical

27 suffering or injury upon them and destroy their houses; Trial

28 Chamber judgment paragraph 735.

29 Finally on the role of Kondewa in terms of the form and

1 degree of participation in the crime, and his willingness and  
2 enthusiasm in the participation of those crimes for which he has  
3 been convicted should be considered as adding to the gravity of  
4 the crimes and lead to the imposition of a significant term of  
11:56:50 5 imprisonment commensurate with the offence committed.

6 It is imperative at this stage to discuss further the  
7 aggravation in the offences of which Kondewa has been committed.

8 PRESIDING JUDGE: And I think it is important for me to  
9 remind you, you know, that you just have five minutes.

11:57:06 10 MR KAMARA: Five minutes. Thank you, My Lord.

11 My Lord, on the issue of mitigation, amongst them the lack  
12 of prior criminal record or conviction, a lack of prior criminal  
13 conviction can serve as a mitigating factor but it is important  
14 to know that a convicted person, if even he doesn't have a  
11:57:26 15 criminal record, doesn't mean that there is not one in existence.  
16 It means that we just cannot find it. And in the case of --

17 PRESIDING JUDGE: If you cannot find it then it is not  
18 there. It is not there. That is the objection I have to that  
19 part of your brief. If you find one let us have it. If you  
11:57:46 20 can't find one then the presumption is that it is not there.

21 MR KAMARA: Quite correct, My Lord. I go with the  
22 presumption. I am saying that because in the scenario in Sierra  
23 Leone there is no uniform system of recording a conviction --

24 PRESIDING JUDGE: No, no, no. In fact, let me be very -- I  
11:58:01 25 think we should agree on that without any further arguments. If  
26 there is no evidence or no record of a previous conviction, if  
27 you have found none, you should not speculate to say: Oh,  
28 because of a record, maybe there is one hiding somewhere which  
29 you do not know. It is not fair to the accused, Mr Kamara.



1 MR KAMARA: I agree. I agree, My Lord. I concede to that.

2 PRESIDING JUDGE: Please.

3 MR KAMARA: I will leave that as a tease that we have not  
4 been able to find any record of conviction.

11:58:29 5 PRESIDING JUDGE: And so there is none against him.

6 MR KAMARA: Very well, My Lord. The Prosecution submits  
7 that there are no mitigating circumstances in Kondewa's case, in  
8 particular for purposes of Rule 101(B)(ii). He has not at any  
9 time cooperated in any way with the Prosecution and there is no  
10 evidence further to suggest that the crimes were committed under  
11 duress or that he was not a voluntary or willing perpetrator of  
12 the crimes, to the extent for which he has been found guilty.

11:58:47 10

13 And, indeed, the Prosecution submit he was a prime mover of their  
14 commission and that Kondewa has never expressed remorse for his  
15 crimes.

11:59:09

16 And the issue of lack of formal education, My Lord, I will  
17 refer their Lordships to my earlier position on Fofana.

18 In concluding, Your Honours, the Prosecution submits that  
19 both Fofana and Kondewa should be sentenced to lengthy terms of  
20 imprisonment reflecting the gravity of their crimes. The  
21 overwhelming circumstances present in their cases and their total  
22 lack of mitigation and personal circumstances be given no weight.

11:59:28

23 My Lord, I will close by saying that, again, no man is  
24 above the law, be you a government militia or a rebel group. All  
25 are subject to the same law. The sentence from this Court will  
26 signal an attempt at [indiscernible] impunity in this part of the  
27 world and in the fight against impunity it is not the beginning,  
28 nor this will be the end, but perhaps it is the end of the  
29 beginning. My Lord, I will stop so far except if you want me to

11:59:49

1 address on other further issues.

2 PRESIDING JUDGE: In your brief you did ask for a  
3 particular sentence. Would you like to reiterate or have your  
4 feelings moved from your submission on the sentence which you  
12:00:26 5 asked for?

6 MR KAMARA: No, My Lord. We did, indeed we've asked for 30  
7 years each, 30 years imprisonment for Fofana and 30 years for  
8 Kondewa and we still stand by that.

9 PRESIDING JUDGE: Thank you.

12:00:42 10 JUDGE BOUTET: Thirty years would include or exclude the  
11 time spent in gaol?

12 MR KAMARA: Would include time served.

13 JUDGE BOUTET: So, which would mean, if we were to go with  
14 30 years it would be 26 years or 25 years, whatever it is.

12:00:52 15 MR KAMARA: As My Lord pleases.

16 JUDGE BOUTET: That is your submission?

17 MR KAMARA: As My Lord pleases.

18 JUDGE BOUTET: Thank you.

19 PRESIDING JUDGE: Yes, thank you. Yes, Mr Powles, you  
12:01:07 20 may --

21 MR POWLES: Your Honours, I didn't want to do the  
22 discourtesy of leaving the Court during my learned friend's  
23 address to Your Honours. May I beg the Court's indulgence for a  
24 short adjournment of perhaps two or three minutes? And in  
12:01:19 25 support of that, can I assure the Court that my submissions will  
26 be substantially less than the hour provided to the Court. I  
27 would estimate between 30 to 40 minutes will be all that will be  
28 required on behalf of Mr Kondewa.

29 PRESIDING JUDGE: That is okay, Mr Powles.

1 The Court will stand down this matter for three minutes.  
2 Let me say five minutes.

3 MR POWLES: Thank you very much, Your Honours.

4 PRESIDING JUDGE: Thank you. The Court will rise.

12:01:44 5 [Break taken at 12 p.m.]

6 [CDF19SEP07B - CR]

7 PRESIDING JUDGE: Learned counsel, the session is resumed.  
8 Mr Powles.

9 MR POWLES: Your Honours, thank you very much for the  
12:15:30 10 break.

11 PRESIDING JUDGE: The Chamber is listening to you on your  
12 submissions.

13 MR POWLES: Grateful, Your Honours. Your Honours, the  
14 following submissions are respectfully offered to the Trial  
12:15:39 15 Chamber to assist it in passing a fair and proper sentence on  
16 Mr Moinina Fofana for the crimes for which he has, by you, been  
17 found guilty. Your Honours, our submissions are divided into  
18 three parts: Firstly, a brief examination of the Trial Chamber's  
19 findings, and importantly, we say, the context in which the  
12:16:01 20 crimes were said to be committed. Secondly --

21 JUDGE BOUTET: Don't go too fast, please. We have the  
22 transcript, but we will get into some difficulties soon. Thank  
23 you.

24 PRESIDING JUDGE: With the interpreters, and maybe the  
12:16:19 25 stenographer, too, to a certain extent.

26 MR POWLES: I will try and keep my speed slow and still try  
27 to keep within the 40-minute time estimate. The first issue that  
28 we seek to deal with is a brief examination of the Trial  
29 Chamber's findings, and importantly, we say, the context in which

1 the crimes were said to be committed. Secondly, a few  
2 submissions on Moinina Fofana as a person, and his efforts and  
3 conduct towards peace and reconciliation in Sierra Leone, and  
4 thirdly, we will submit a detailed consideration of the relevant  
12:16:51 5 authorities in support of what we say is the proper sentence to  
6 be passed in light of them.

7 Your Honours, firstly, the Trial Chamber's findings under  
8 context and background situation in Sierra Leone during the  
9 relevant period. We only wish to briefly consider and highlight  
12:17:09 10 a few issues in relation to the Trial Chamber's findings.

11 Firstly, the charges in the CDF case were various and  
12 broad. However, the findings of guilt with respect to Fofana  
13 were decidedly few and narrow. Save for the aiding and abetting  
14 crimes in Tongo Field, Mr Fofana was cleared of all allegations  
12:17:32 15 pursuant to Article 6.1 of the Special Court Statute. That  
16 means, of course, he is not someone who has personally committed  
17 any of the crimes as alleged in the indictment. This, we say, is  
18 crucial as the most serious sentences are reserved, quite  
19 properly, for those who actually carry out the crimes with intent  
12:17:55 20 of so carrying them out.

21 Secondly, Moinina Fofana is not someone who planned,  
22 instigated or ordered any of the crimes as alleged in the  
23 consolidated indictment. Again, we say that is of crucial  
24 importance, because they attract the more serious penalties. He  
12:18:12 25 was not found guilty of any participation in any joint criminal  
26 enterprise and nor was he found guilty by any mode of liability  
27 of the use of child soldiers.

28 In terms of the crime base areas, he was acquitted of all  
29 involvement in the crime base areas of Bonthe District, Kenema,

1 Talia, Base Zero and the Moyamba District. So what is left is  
2 Moinina Fofana aiding and abetting crimes in Tongo Field and  
3 failing to prevent crimes pursuant to Article 6.3 of the Statute,  
4 failing to prevent crimes in Koribundu and Bo District. It is  
12:18:47 5 important, we submit, to stress the very limited time frame in  
6 which those offences were said to be committed. Tongo Field  
7 occurred in January to February 1998, Koribundu in February 1998,  
8 and Bo District, also in February 1998. The offences were  
9 limited to a two-month time period: January to February 1998.

12:19:13 10 In terms of context, we say that in determining the right,  
11 proper and fair sentence for such conduct, the Trial Chamber must  
12 look at the conduct in the context of the prevailing situation in  
13 Sierra Leone at the time in which they were committed. We make  
14 three points in this regard. The first point, of course, is to  
12:19:33 15 highlight the Trial Chamber's findings in relation to crimes  
16 against humanity. We say this is of crucial importance for the  
17 purposes of determining the proper sentence because the CDF  
18 crimes were not the primary object of their actions or any  
19 attack. As found by the Trial Chamber at paragraph 693 of the  
12:19:53 20 judgment, the evidence shows the CDF attacks were directed  
21 against the rebels or juntas that controlled towns, villages and  
22 communities throughout Sierra Leone. The CDF and Kamajors fought  
23 for the restoration of democracy.

24 It is clear, therefore, that the crimes committed by the  
12:20:11 25 CDF were committed in the context and against the background of  
26 trying to rid from Sierra Leone the widespread suffering caused  
27 by the rebels and junta forces, with the aim of restoring  
28 democracy and thus protecting the civilian population, not using  
29 civilian population as the primary target of any attack. This,

1 we say, is powerful and weighty mitigation.

2 Secondly, when considering context, we say it is of course  
3 of vital importance for the Trial Chamber, as a whole, to have in  
4 mind the findings in his separate and dissenting opinion of your  
12:20:48 5 brother judge, Judge Thompson. At paragraph 101 of his learned  
6 opinion, he found the evidence also reasonably shows that the  
7 safety of the state of Sierra Leone as a supreme law became, for  
8 the CDF and the Kamajors, the categorical, imperative and  
9 paramount obligation in their military efforts to restore  
12:21:10 10 democracy to this country.

11 At paragraph 103, he went on, the CDF was engaged in  
12 defensive military action to restore a lawful and democratically  
13 elected government to power. While the majority did not find,  
14 which we accept, as we must, that any defence of necessity could  
12:21:31 15 excuse the criminal conduct found, we submit that the views  
16 expressed by your learned brother judge, Judge Bankole Thompson,  
17 are relevant to context and amounts, at the very least --

18 PRESIDING JUDGE: Did our decision talk of necessity at  
19 all?

12:21:47 20 MR POWLES: Your Honours, no, of course not. That's the  
21 point we make. We of course accept, which we must, that the  
22 majority of the Trial Chamber did not accept --

23 PRESIDING JUDGE: Because it was not on the table.

24 MR POWLES: Your Honour, yes, we accept that. We accept  
12:21:59 25 that while it is not a defence in the mind of the majority, we  
26 submit that the findings and views of your brother judge, Judge  
27 Bankole Thompson, are at the very least a persuasive mitigating  
28 factor when considering sentence.

29 JUDGE BOUTET: Why?

1 MR POWLES: Because of the findings that he made in terms  
2 of the --

3 JUDGE BOUTET: This is not the majority. The majority has  
4 not made those findings, so why should we, as a court now, apply  
12:22:27 5 this approach to the majority finding when, on the one hand, as  
6 my learned brother Justice Itoe just mentioned, you didn't raise  
7 it. It was never raised as a defence under any circumstances by  
8 any of the party, but Justice Thompson decided to see it that  
9 way. That's his views on the law on this, but this is not an  
12:22:53 10 aspect that we dealt with.

11 MR POWLES: Your Honour, yes.

12 JUDGE BOUTET: This is not the majority judgment.

13 MR POWLES: Your Honour, yes, we accept that, as we must,  
14 and let me --

12:23:02 15 PRESIDING JUDGE: And it was not considered and addressed  
16 at any stage.

17 MR POWLES: We accept that, as we must, but, of course --

18 PRESIDING JUDGE: In making this decision that we came to,  
19 it was not assessed at any stage.

12:23:14 20 MR POWLES: Your Honour, yes. The defence of necessity, we  
21 don't raise these submissions in aid of any submission in support  
22 of any defence. We are well beyond that stage. As has been  
23 pointed out, nor did we raise it during the trial phase. We  
24 submit that the views and findings of your brother Judge Bankole  
12:23:35 25 Thompson in respect of the prevailing circumstances in Sierra  
26 Leone at the time in which these offences were committed, while  
27 we accept, which we must, that those prevailing circumstances do  
28 not amount to an absolute defence, we submit that they go some  
29 way towards a basis for mitigation on behalf of our client,

1 Mo in na Fofana.

2 JUDGE BOUTET: Put in these terms, I would have not too  
3 many difficulties, but, I mean, we have, indeed, as a majority,  
4 concluded that there existed special circumstances at the time.

12:24:14 5 We have agreed they were fighting to restore democracy. There is  
6 no dispute on this.

7 MR POWLES: Yes.

8 JUDGE BOUTET: This has been clearly conceded by the  
9 Prosecution.

12:24:24 10 MR POWLES: Yes.

11 JUDGE BOUTET: This is not disputed. If this is indeed the  
12 position you are advocating in support of your position, I will  
13 accept that. It is the step after that that I have some  
14 difficulties, conclusions or inferences drawn from that that we  
15 did not make in our own majority decision.

16 MR POWLES: Your Honour, let me make crystal clear, lest  
17 there be any misunderstanding, we are in no way seeking to go  
18 behind the majority decision and the findings of the majority.  
19 All we simply say is that the findings, which, as Your Honour  
12:24:56 20 rightly points out, are mirrored and echoed in the majority  
21 decision in relation to the prevailing situation in Sierra Leone,  
22 and the motivations for the CDF forces and actions. We say that  
23 that goes towards mitigation, but as Your Honour rightly points  
24 out, those sentiments are echoed in the majority decision, in any  
12:25:15 25 event.

26 PRESIDING JUDGE: Let me say this, Mr Powles: Even then,  
27 the notion of fighting to restore democracy was not specifically  
28 raised as a defence, as such.

29 MR POWLES: At no time.



1           PRESIDING JUDGE: At no time was it. It was only  
2 tangentially suggested in cross-examination and testimony, and so  
3 on, and if the majority decision stretched out to embrace that,  
4 it is because it came out, you know, somehow in the course of  
12:25:51 5 cross-examination of the Prosecution witnesses, and even in the  
6 course of the presentation of the Defence case through their  
7 witnesses, and in the process of their cross-examination. That  
8 is as far as we are able to go. I do not think it is for us to  
9 go looking for defences for an accused person who is --

12:26:17 10           MR POWLES: Your Honour, may I make it crystal clear, if I  
11 have not done it already at this stage, we are not raising it at  
12 this stage, nor did we at any stage during the proceedings as a  
13 defence.

14           The third and final issue in terms of context which we say  
12:26:30 15 is important to mention, even if only in passing, is the amnesty  
16 provided in the Lome agreement. Of course, Your Honours are  
17 acutely aware that in July 1999, the Lome agreement was signed  
18 and an amnesty granted to, amongst others, the Civil Defence  
19 Forces in respect of anything done by them in pursuit of their  
12:26:51 20 objectives as an organisation up until the time of the signing of  
21 that agreement.

22           The Appeals Chamber ruled on 13 March 2004 that the amnesty  
23 could not amount to a bar to Prosecution. We of course for  
24 present purposes, accept that ruling. What the Appeals Chamber  
12:27:15 25 did not consider, and we say therefore left open, is the extent  
26 to which a beneficiary of and an adherent to the express terms of  
27 the Lome agreement can rightly expect to receive a lesser  
28 sentence. In his separate opinion, supporting the majority, His  
29 Honour Judge Robertson in finding in favour of the

1 non-applicability of the Lome Accord, accepted that there was  
2 potentially significant justification in terms of looking at  
3 sentence in view of someone who has abided by the terms of the  
4 Lome agreement.

12:27:48 5 Mr Fofana has not been convicted of any crimes that  
6 post-date the Lome agreement of July 1999. All the matters of  
7 which he has been convicted predate the coming to force of Lome.  
8 He, therefore, can be said to be somebody who abided by the terms  
9 of Lome.

12:28:08 10 Now even though we accept it may not be a bar to  
11 Prosecution, we say it should be taken into account and given  
12 proper weight when determining sentence.

13 Your Honours, those conclude our submissions in terms of  
14 context. In summary, we acknowledge the Trial Chamber, after  
12:28:22 15 having heard all of the evidence in this case over a considerable  
16 period of time is, as a result, now fully aware of and alive to  
17 the reasons behind the establishment of the CDF and the efforts  
18 made by those in it to defend the civilian population and restore  
19 democracy, and we urge the Trial Chamber to give this factor  
12:28:43 20 proper weight and prominence as a mitigating factor.

21 Moving on then to consider the second part of our  
22 submissions: Mr Fofana, the man and his actions after the war,  
23 or certainly after the middle of July or the middle of 1998 and,  
24 in particular, his contribution to peace and reconciliation.

12:29:04 25 We have submitted six statements for consideration by the  
26 Trial Chamber. Five concern Mr Fofana's conduct and his  
27 contribution to peace and reconciliation after the criminal  
28 conduct period, and one statement, a straight memorandum,  
29 concerns his behaviour in the detention unit.

1           Taken individually and together, we say this evidence  
2 provides an insight into the kind of man that Moinina Fofana is  
3 and the kind of man that stands before you today to be sentenced.  
4 The statements provided have come from upstanding and varied  
12:29:41 5 members of Sierra Leonean civil society.

6           The first from a Frances Fortune, the head of a leading and  
7 well-respected NGO committed to peace-building in Sierra Leone.  
8 It is also right to note that she is the Canadian honorary consul  
9 here in Sierra Leone. A statement is also provided by a Sierra  
12:30:01 10 Leonean ambassador; thirdly, a member of parliament; and,  
11 fourthly, a former member of the EC involved in peace-building;  
12 fifthly, a statement from a former member of the RUF who worked  
13 towards peace-building with Moinina Fofana.

14           We say it is impressive that such upstanding members of  
12:30:19 15 society are prepared to voice their support for Fofana and to  
16 attest to his character and confirm his commitment to the peace  
17 process, such was the level of his contribution before taken into  
18 custody by this Court.

19           Starting then with the statement of Frances Fortune.  
12:30:43 20 Frances Fortune who, as Your Honours have heard, is here, present  
21 at the Special Court today, to signify and show her support for  
22 Moinina Fofana in seeking mitigation before Your Honours. She  
23 sits in court at the back of the public gallery and has taken  
24 time out of her busy schedule to be here today.

12:31:04 25           Frances Fortune is the regional director of the search for  
26 common ground. In 1999, following the Lome Peace Agreement, she  
27 worked with a campaign for peace within the CDF, an organisation  
28 funded by the European Union. The aims of the campaign for peace  
29 were to ensure that the CDF was informed and prepared for the

1 peace process, and it is important here to draw a distinction  
2 between the Commission For Consolidation For Peace, as mentioned  
3 by my learned friend Mr Kamara, and rightly pointing out that any  
4 work done towards the work of that organisation was rejected by  
12:31:40 5 your fellow Trial Chamber, rightly rejected, we say, because, of  
6 course, that organisation was an AFRC organisation set up for,  
7 perhaps, purposes and reasons of their own. The organisation for  
8 which Fofana contributed the campaign for peace, and that is  
9 supported and headed by Frances Fortune, was an entirely  
12:32:01 10 different organisation and one, as we say, funded by the European  
11 Union.

12 Moinina Fofana was a key member of the team, according to  
13 Ms Fortune. He was a willing interlocutor and greatly assisted  
14 in bringing the CDF on board to the peace process through his  
12:32:19 15 active engagement and travel to many communities, particularly in  
16 the south.

17 Fofana, Frances Fortune notes, was not paid for his  
18 services. He became dubbed, in the words of Frances Fortune, as  
19 Your Honours indeed heard during the course of the trial, the  
12:32:39 20 director of peace, a title that we say aptly describes the kind  
21 of man that Moinina Fofana was and the contribution he made,  
22 certainly from the middle of 1998 and thereafter.

23 PRESIDING JUDGE: A transition from the Director of War to  
24 the Director of Peace.

12:32:53 25 MR POWLES: Your Honour, yes, and it was after the middle  
26 of 1998 that he started to become known as the Director of Peace.

27 PRESIDING JUDGE: Right.

28 MR POWLES: Moinina Fofana attended numerous events at his  
29 own expense to contribute to the peace process. He was, in the

1 words of Ms Frances Fortune, a team player who drew others into  
2 the peace process, including former members of the RUF, and I  
3 will read out paragraph 11 of her statement in full because we  
4 say it is very important:

12:33:22 5 "Moinina Fofana's role in the reconstruction of the hearts  
6 and minds of the CDF to embrace peace is substantial."

7 I will stress this:

8 "No other member of the CDF actively engaged at the  
9 community level to ensure that the membership had a clear  
12:33:38 10 understanding of the expectations integral to the Lome  
11 Peace Agreement. His contribution to the restoration of  
12 peace and democracy was significant and meaningful."

13 Next, this is a statement of Foday Sesay, the Sierra  
14 Leonean ambassador to Austria, Germany, Italy and Switzerland.

12:33:58 15 In many ways it largely corroborates and supports the statements  
16 made by Frances Fortune, so, of course, I don't seek to take  
17 Your Honours to it in any great detail. We say this confirms  
18 Moinina Fofana's status as someone concerned with peace-building  
19 from 1999 and onwards.

12:34:15 20 Thirdly, the statement of Simon Arthy, the European  
21 Commission/Sierra Leone Resettlement and Rehabilitation Programme  
22 head from July 1998 to February 2001. Mr Arthy is now working  
23 for the Department of International Development, the UK  
24 government department, known as DFID. He is now currently  
12:34:35 25 working in Nepal and is unable therefore to be in Sierra Leone to  
26 show support for Moinina Fofana at this stage.

27 He wrote his statement in September 2003, detailing his  
28 interaction with Fofana and described him as someone who he had  
29 considerable respect for and for the work that Fofana did. He

1 confirms that Moinina Fofana attended many workshops funded by  
2 the EU, who Mr Arthy was heading at that time, in the south of  
3 Sierra Leone, and he moved around the region tirelessly,  
4 educating the CDF of what constituted acceptable behaviour,  
12:35:11 5 emphasising their role as being that of protecting the civilian  
6 populace and discussing with them the implications of the Lome  
7 Agreement. That was Fofana's role following July of 1998, of  
8 course, after the time period for which he is said to have  
9 committed offences.

12:35:30 10 Mr Arthy confirms that Fofana supported a series of 30, 30  
11 European Commission-funded civic education/reconciliation  
12 workshops for all CDF commanders and initiators in the south,  
13 speaking personally at many of those events.

14 In summary, he concludes:

12:35:49 15 "Throughout my period of involvement with Moinina Fofana,  
16 he proved himself to be a committed advocate of peaceful  
17 co-existence between the CDF and the civilian community,  
18 and a very proactive person in promoting reconciliation  
19 between all factions in Sierra Leone."

12:36:06 20 That, of course, is confirmed in part by the statement of  
21 Osheku Tejan Sankoh [phon], a member of parliament, confirming  
22 Fofana attended workshops. In his statement he says August 1997,  
23 but, of course, that must be August 1998, because, of course, in  
24 his statement, Mr Tejan Sankoh confirms that he was in Guinea  
12:36:24 25 from July 1997 to February of 1998. So, of course, it must be  
26 August 1998 rather than 1997.

27 Finally, the statement of Rashid Abdul Sandy, a one-time  
28 commander in the RUF. He describes Fofana as a very nice man and  
29 someone who cautioned people "not to hurt us." He means him and

1 members of his family, members of the RUF when they were held in  
2 custody. Fofana was also concerned and followed up to ensure  
3 that other members of the RUF detained in custody at that time  
4 were properly taken care of.

12:36:56 5 The most important part of Mr Abdul Sandy's statement is  
6 contained on page 2. He confirms that Fofana and he, both  
7 together as members of the CDF and RUF, contributed to the  
8 campaign for peace under the auspices of Frances Fortune and they  
9 did that together from September 2000 till March of 2001.

12:37:20 10 Abdul Sandy assessed Fofana as a man who is actually  
11 determined to seek perfect peace and tranquillity in this  
12 country, and that comes from a person who was a former member of  
13 the RUF.

14 Fofana has been in custody at the Special Court since 10  
12:37:41 15 August 2003. An assessment of his behaviour in custody is  
16 provided to Your Honours by Robin Paul, the officer in charge of  
17 the detention centre. He states that during detention Moinina  
18 Fofana's behaviour has been very good. He has dealt with all at  
19 the detention unit in an appropriate and respectful manner.

12:38:01 20 Fofana has demonstrated a willingness and a commitment to learn.  
21 He has progressed in both English and computer literacy.  
22 Whenever Fofana has presented his opinion on a particular issue,  
23 he has done it, in the view of Mr Paul, with poise,  
24 understanding, and tact. He has never been drawn into detention  
12:38:22 25 politics.

26 Fofana has been a support to other detainees, in  
27 particular, Mr Kondewa, who was deeply affected after the death  
28 of Chief Norman. His concluding remarks are that Moinina Fofana  
29 displays a calm demeanour and composure, and his successful

1 ability to adapt has been a positive example to those currently  
2 detained at the Special Court detention centre.

3 Overall then, Mr Fofana is a person who, from the middle of  
4 1998 to the time of his arrest, was committed to the peace  
12:39:00 5 process and to the rebuilding of Sierra Leone, a man committed to  
6 reconciliation and peace, hence his latter title, the Director of  
7 Peace. He is a man who, in detention, has been described as  
8 calm, tactful and helpful to others.

9 Mr Fofana has asked me to specifically address five points  
12:39:24 10 on his behalf to Your Honours. Firstly, the CDF was established  
11 for the sole aim of protecting the civilian population and  
12 restoring the democratically elected government. These were,  
13 similarly, Moinina Fofana's sole reasons and motivating factors  
14 in joining the CDF movement.

12:39:47 15 Your Honours will see the letter from the office of the  
16 president attached to the Fofana sentencing brief, indicating  
17 that Fofana will be awarded the Nyagua medallion in recognition  
18 for his bravery, gallantry, courage and dedication to the cause  
19 of democracy. He was congratulated on his contribution to the  
12:40:10 20 national development of the country. That medal is here and,  
21 indeed, there is a photo from the past president awarding that  
22 medallion to Mr Fofana.

23 Secondly, Mr Fofana accepts that crimes were committed by  
24 the CDF during the conflict in Sierra Leone. Indeed, at least  
12:40:34 25 one witness was called on behalf of the Fofana defence, Joseph  
26 Lansana, accepting and attesting to crimes committed by the CDF.  
27 Mr Fofana, like all fair-minded and decent people in Sierra  
28 Leone, deeply regrets all the unnecessary suffering that has  
29 occurred in this country.



1 Thirdly, from mid-1998 onwards, as the statements have  
2 attested to, from mid-1998 onwards, Moinina Fofana was committed  
3 and active in addressing division in Sierra Leone and  
4 contributing to a more peaceful society.

12:41:12 5 Fourthly, and importantly, Moinina Fofana wholeheartedly  
6 accepts the jurisdiction of the Special Court. He has full  
7 respect for it and recognises that it has a role to play in  
8 contributing to peace and reconciliation in Sierra Leone. He has  
9 a profound respect for the rule of law and institutions of  
12:41:34 10 justice.

11 Fifthly, and finally, upon release back into the community,  
12 Moinina Fofana intends to continue with his peace-building  
13 efforts.

14 Your Honours, for what it is worth, during all of my  
12:41:55 15 interactions with Moinina Fofana since the end of last year to  
16 the present time, he strikes as a man committed to being of  
17 benefit and worth to his country, and of being a useful member of  
18 civil society. He is, in the view of all in the Fofana team, the  
19 calm, tactful and helpful man as described by the head of the  
12:42:14 20 detention unit, Mr Robin Paul.

21 Thirdly then, and moving on to the final part of our  
22 submissions, the appropriate sentence to pass. In this section,  
23 we will deal briefly with the Prosecution submissions and then  
24 look at the actual authorities and the proper authorities that we  
12:42:32 25 say demonstrate what sentence should be imposed in this case.

26 The Prosecution assert that Fofana's sentence should be 30  
27 years of imprisonment. Such a sentence, we say, would be  
28 totally, totally inconsistent with the Trial Chamber's findings  
29 and is totally unsupported by the authorities. In line with

1 prosecuting authorities at other international tribunals, who are  
2 known to ask for inflated sentences, only then for the Trial  
3 Chamber to impose the proper and actual and more often than not  
4 much lower sentence warranted by the case.

12:43:07 5 The main reason and error that the Prosecution make is in  
6 focusing on the most serious offence that Fofana has been  
7 convicted of, namely murder, rather than focusing on the mode of  
8 liability for the commission of that offence, as found by the  
9 Trial Chamber, namely aiding and abetting, and pursuant to  
12:43:26 10 Article 6.3, command responsibility.

11 At paragraph 78 of their sentencing brief, the Prosecution  
12 say that based on ICTR authorities, Fofana's sentence would be  
13 one of life imprisonment. This is simply wrong. As we shall  
14 see, authorities from both the ICTR and ICTY show that in certain  
12:43:51 15 circumstances, even when convicted of murder, sentences in the  
16 region of two to five years have been passed.

17 At paragraph 79 the Prosecution say that under the law of  
18 Sierra Leone Fofana is liable for the death sentence if  
19 convicted. But the limited applicability of Sierra Leonean law  
12:44:07 20 to international crimes, particularly, particularly when  
21 committed pursuant to forms of liability not known to Sierra  
22 Leonean law, for example, command responsibility, that is  
23 something, of course, this Trial Chamber will take into  
24 consideration. Moreover, even in Sierra Leonean law, as in all  
12:44:22 25 domestic case law, conviction of any crime, as an aider and  
26 abetter, usually and properly attracts a much lower sentence.

27 At paragraphs 128 to 137 of their brief, and indeed in all  
28 submissions this morning, the Prosecution failed to take account  
29 of the very pertinent and proper mitigating factors that we say

1 support a sentence of four years or less being imposed in this  
2 case.

3 Looking then briefly at the modes of liability of which  
4 Fofana has been convicted; aiding and abetting, firstly. It is  
12:44:59 5 important to stress that this is a secondary or indirect mode of  
6 liability, not the direct mode as mentioned by the Prosecution.  
7 Aiding and abetting can encompass a very wide spectrum of  
8 conduct. On the one hand, from the aider and abetter who was  
9 present at the scene of a crime, for example, giving out weapons  
12:45:18 10 and direct words of encouragement at the scene of any crime.

11 The findings against Moinina Fofana, on the other hand, we  
12 say, are at the other end of the spectrum, at the lower end of  
13 the spectrum. The words said, that constitute aiding and  
14 abetting by Moinina Fofana, were made at the passing out parade  
12:45:37 15 at a separate location and at a different period of time to those  
16 who actually carried out the offences.

17 Your Honours will see at page 11 of the Prosecution table  
18 detailing the ICTR authorities --

19 PRESIDING JUDGE: Mr Powles, what distinction do you make  
12:45:57 20 of, following your analysis, of a perpetrator who is on the field  
21 distributing arms, actively distributing arms, and the other one  
22 who, it has been accepted, distributes the arms before sending  
23 the troops to action?

24 MR POWLES: Well, Your Honour, of course --

12:46:23 25 PRESIDING JUDGE: Call him a storekeeper, call him  
26 whatever; what distinction do you make of that?

27 MR POWLES: Well, Your Honour, the authorities do show that  
28 an individual present at the scene of a crime, and directly  
29 contributing to the commission of offences, in normal

1 circumstances, warrants and deserves greater punishment. It is  
2 at the more serious end of the spectrum to someone who is not  
3 present at the scene of the crime and contributing as aiding and  
4 abetter at a time distance in space and in time to the actual  
12:46:53 5 commission of the crimes. We say that is a much lower form of  
6 contribution, and that should be reflected in sentence.

7 On this point it is important to draw attention to the case  
8 of Joseph Nzabirinda at the ICTR. It is at page 11 of the table,  
9 helpfully submitted by the Prosecution, in terms of appropriate  
12:47:20 10 sentences at other tribunals. This is the case that we say,  
11 perhaps, best fits the circumstances, in many ways, to what  
12 Moinina Fofana has been found guilty of. It's at page 11, it's  
13 the case of Joseph Nzabirinda. He was found guilty -- he pled  
14 guilty to murder as a crime against humanity at the ICTR and  
12:47:51 15 received a sentence as an aider and abetter and received a  
16 sentence of seven years imprisonment.

17 As mitigation, of course, he did plead guilty and received  
18 that sentence. But in terms of his role as an aider and abetter,  
19 he was present at the scene and an approving spectator and it was  
12:48:14 20 on that basis that he was found to be an aider and abetter and  
21 therefore, we say, a more serious aider and abetter of the crimes  
22 of murder in that case than those found against Moinina Fofana.  
23 And, of course, the other distinguishing and important  
24 distinguishing factor between that case and this is, of course,  
12:48:33 25 this: Before the ICTR, the murder of which Nzabirinda was  
26 sentenced to seven years, was committed in the context of a  
27 genocide by Hutus on Tutsis. A totally different situation from  
28 the situation here in Sierra Leone, where the crimes were  
29 committed as war crimes in the context of defending the civilian

1 population and of restoring democracy.

2 In relation to Article 6.3, command responsibility, the  
3 first point to make is that Article 6.3 is a less grave form of  
4 liability. In the case of Oric at paragraph 724, the Trial  
12:49:10 5 Chamber pointed out that a person convicted of command  
6 responsibility is not, and this is important to stress, is not  
7 convicted for the crimes of his subordinates but for the failure  
8 to prevent or punish such crimes.

9 The Prosecution this morning made reference to the case of  
12:49:25 10 Blaskic and a position of command is to be seen as an aggravating  
11 factor. It is only right and proper that we should point out  
12 that the quotation made by the Prosecution was from the Trial  
13 Chamber judgment in the Blaskic case when Blaskic received a 45  
14 year sentence for his role as a commander which was reduced on  
12:49:50 15 appeal to nine years thereafter. So the references made by the  
16 Prosecution in support of that are perhaps are not as strong as  
17 they may seem because that decision was overturned by an Appeals  
18 Chamber.

19 Your Honour, we would like to specifically draw support  
12:50:05 20 from two authorities for the sentence that we say is appropriate.  
21 The case of Enver Hadzihanovic and Kubura at the ICTY and the  
22 case of Naser Oric at the ICTY. We have provided copies of the  
23 relevant sections of those judgments for Your Honours this  
24 morning.

12:50:24 25 In Hadzihanovic, he was convicted after a trial, after  
26 having pleaded not guilty, of command responsibility, failure to  
27 prevent Article 3 murder, as a war crime. The Trial Chamber  
28 found, as personal mitigating circumstances in support of a  
29 five-year sentence that they passed for the serious crime of

1 murder pursuant to Article 7.3, command responsibility. In  
2 passing that five-year sentence, the personal mitigating factors  
3 the Trial Chamber took into consideration are, for example,  
4 these: At paragraph 2078 they gave Hadzihasanovic good credit  
12:51:10 5 for the good conduct in the United Nations detention unit and for  
6 his good conduct during the hearings. We would submit the same  
7 should apply to Fofana.

8 Second of all, at paragraph 2079, the Trial Chamber took  
9 into account the fact that the accused was married and had two  
12:51:27 10 children. Well, Fofana has got four wives, I don't know if that  
11 increases the mitigation four-fold but, in any event, he has four  
12 wives and a number of children and has always expressed concern  
13 for his family to members of the Fofana Defence team. And as set  
14 out in the memo from Robin Paul at the detention unit, has also  
12:51:48 15 shown that he has a close and caring relationship with them.

16 At paragraph 2080, Hadzihasanovic's character show that he  
17 can be rehabilitated was taken into consideration by the Trial  
18 Chamber, and again we say that very much applies for Mr Fofana.  
19 Moreover, at paragraph 2080, the Trial Chamber made note of,  
12:52:09 20 amongst other things, the good manners, and then finally, they  
21 made note of the fact that Hadzihasanovic had no completed  
22 theoretical and practical training.

23 It is important to point out that not only is he not  
24 educated, Mr Fofana is importantly not a trained military man.  
12:52:27 25 He assumed a difficult position without the requisite training to  
26 assist him in how to conduct himself properly during an armed  
27 conflict.

28 Mitigating circumstances were found by the Trial Chamber in  
29 Hadzihasanovic, at paragraph 2081. Very important indeed, we

1 say, is this mitigating factor, especially -- in the case of  
2 Hadzahasanovic, the Trial Chamber found it especially important  
3 to note the context in which Hadzahasanovic's crimes were  
4 committed. The Trial Chamber referred to case law of the ICTY at  
12:53:03 5 paragraph 2081, case of the ICTY that calls for taking into  
6 account, and I shall quote, "The context in which the  
7 incriminating acts took place in determining which sentence to  
8 impose."

9 We say that is crucial and, for those reasons, the context,  
12:53:22 10 as found by the Trial Chamber, is crucial as a mitigating factor.

11 The CDF, like the third core of the BiH army, was faced  
12 with a generally difficult situation, namely, they were called  
13 upon to defend the civilian population in the face of massive and  
14 widespread human rights abuse. The Hadzahasanovic chamber  
12:53:48 15 concluded that although it does not justify, and this is  
16 important, and we accept, although it does not justify the causes  
17 or consequences, that particular context casts the accused  
18 Hadzahasanovic's failures in a light which leads the Trial  
19 Chamber to show leniency. We similarly ask this Trial Chamber to  
12:54:10 20 show due leniency to Fofana, given the context in which his  
21 crimes took place.

22 In terms of aggravating circumstances, at paragraph 2082,  
23 the Trial Chamber noted the lengthy time span over which the  
24 criminal acts took place. In Hadzahasanovic it was a seven-month  
12:54:31 25 period for one crime base area, and a three-and-a-half month  
26 period for another crime base area.

27 In Fofana's case, by contrast, the short time span is that  
28 of only two months at the beginning of 1998. So we would submit  
29 that the time span cannot, in this case, amount to an aggravating

1 circumstance. At paragraph 2083, the Trial Chamber in  
2 Hadzahasanovic took into account the large number of victims. In  
3 Hadzahasanovic it was several hundred. That didn't prevent the  
4 Trial Chamber passing the sentence it did of five years.

12:55:05 5 At paragraph 2084, the Trial Chamber in Hadzahasanovic  
6 considered a particularly heinous murder as an aggravating  
7 factor. The heinous murder in that case was the beheading of a  
8 civilian. It follows that any such matters clearly didn't  
9 preclude and stop the Trial Chamber passing the sentence that it  
12:55:31 10 did, namely, five years, for the crime of murder.

11 It is important to note that the Trial Chamber passed a  
12 sentence of five years for the cruel treatment and murders that  
13 Hadzahasanovic was convicted following trial. It is important to  
14 note that that five-year sentence was passed by the Trial  
12:55:48 15 Chamber, notwithstanding a call for 20 years of imprisonment from  
16 the Prosecution.

17 Turning then to the second authority, that of Naser Oric.  
18 This again is a Trial Chamber decision and it is only right and  
19 proper that I should point out that this judgment is currently  
12:56:04 20 under appeal by the Prosecution and, indeed, by the Defence at  
21 the ICTY. It is important to note that Mr Oric received a  
22 two-year sentence for failure to prevent murder pursuant to  
23 Article 7.3 and Article 3 of the ICTY Statutes. So again, a  
24 serious crime and identical to that in this case, namely, murder.  
12:56:32 25 But the Trial Chamber in Oric felt able to pass a two-year  
26 sentence and ordered Naser Oric's immediate release from the  
27 custody of the ICTY following their judgment and sentence.

28 The important parts of this decision, or judgment, are  
29 these: At paragraph 719, the Trial Chamber referred to



1 retribution and deterrence, and a need for showing the outrage of  
2 the international community at the crimes and to reflect a fair  
3 and balanced approach to the execution of punishment for  
4 wrongdoing. They concluded that the penalty must be  
12:57:09 5 proportionate to the wrongdoing, a sentiment which we echo.

6 At paragraph 728 of the Trial Chamber judgment they said  
7 this: That the crimes of murder and cruel treatment in a war  
8 crime context are inherently grievous. We accept that. They  
9 went on to say that: Failure to prevent the occurrence of such  
12:57:31 10 heinous crimes is necessarily also intrinsically grievous. We  
11 accept that. Notwithstanding the inherent grievousness of the  
12 situation and the crimes, the Trial Chamber passed a sentence of  
13 two years imprisonment.

14 In highlighting the aggravating circumstances at paragraph  
12:57:57 15 735 of the judgment, the Trial Chamber pointed out that the  
16 victims in the said case were vulnerable. They in particular  
17 drew attention to the low age of a victim, thus making him a  
18 particularly vulnerable victim. Again, the Trial Chamber,  
19 notwithstanding that finding, passed a two-year sentence.

12:58:13 20 At paragraph 739 of the Trial Chamber's consideration, the  
21 duration of the criminal conduct. At the end of December 1999 to  
22 20 March 1993, that was not found by the Trial Chamber to be a  
23 significant enough duration as to amount to an aggravating factor  
24 and is, of course, longer than the time frame of criminal conduct  
12:58:37 25 as found in this case.

26 At paragraph 741, the Trial Chamber note as an aggravating  
27 factor that the crimes were committed with premeditation and  
28 zeal, not relevant to this case, we would submit.

29 At paragraph 744, they considered the superior position of

1 the accused, and they also found his authority as an accused  
2 commander, as described on paper, did not reflect the real  
3 situation on the ground.

4 The Trial Chamber then went on to consider mitigating  
12:59:09 5 circumstances. They considered at paragraph 748 the accused's  
6 lack of cooperation or otherwise with the Prosecution. And this  
7 is the important part: At paragraph 752, the Trial Chamber  
8 considered expression of remorse, and if I may quote the  
9 important part of that paragraph:

12:59:27 10 "The Appeals Chamber has held that an accused can express  
11 sincere regrets without admitting his participation in a crime,  
12 and that this is a factor which may be taken into account. This  
13 can be done without an accused having to give evidence or being  
14 cross-examined by the Prosecution. In this case, the accused has  
12:59:49 15 made no such statement, but throughout the trial, there were a  
16 few instances when the Defence counsel, on his behalf, expressed  
17 compassion to witnesses for their loss and suffering. The Trial  
18 Chamber does not doubt the sincerity of the accused in expressing  
19 empathy with the victims for their loss and suffering, and has  
13:00:09 20 taken this sincerity into considering as a mitigating factor."

21 We say that is wholly applicable here, and it is not right  
22 therefor for the Prosecution to point to the fact that Fofana has  
23 pleaded not guilty.

24 At paragraph 757 of the Oric judgment, the Trial Chamber  
13:00:32 25 went on to consider additional factors. They considered Oric's  
26 young age; however, did not give much weight to that factor. The  
27 Trial Chamber also took into consideration the enormous burden  
28 passed on Oric at that young age. While the situation in  
29 Srebrenica where Oric's crimes took place was desperate, so were

1 the situations and findings of the Trial Chamber in relation to  
2 Fofana's background and context here in Sierra Leone. Fofana may  
3 not necessarily have been young, but he certainly lacked  
4 experience and was thrown into the desperate situation and asked  
13:01:06 5 to act.

6 At paragraph 758, the Trial Chamber considered family  
7 circumstances and placed limited importance upon that. At  
8 paragraph 759, they considered the fact that the accused had no  
9 previous convictions and gave a limited or no amount of  
13:01:23 10 consideration to that.

11 At paragraph 762, the Trial Chamber state that all accused  
12 are to behave when in detention, and therefore little if no  
13 credit was given to Oric for his good behaviour.

14 PRESIDING JUDGE: Sorry, Mr Powles, yes.

13:01:47 15 MR POWLES: The Trial Chamber in Oric gave limited, if no  
16 weight to the fact that Oric had behaved well in detention,  
17 finding that all detainees should behave well, of course, when in  
18 detention. We say that Fofana has in a way gone slightly beyond  
19 that and proved to be a positive example as stated by Mr Paul  
13:02:07 20 whilst being detained in detention at the Special Court.

21 Paragraph 764, acts of consideration towards Serb  
22 detainees. We say that Fofana, as shown by the statement of  
23 Rashid Abdul Sandy, the RUF soldier who Fofana assisted, we say  
24 similar credit should be given to Fofana for assisting RUF  
13:02:30 25 members while in detention.

26 At paragraph 765, the Trial Chamber considered cooperation  
27 with S4, and Oric was described in positive terms by one  
28 individual within S4. Obviously similar words of praise have  
29 been heaped upon Moinina Fofana by those witnesses who have

1 provided statements attesting to his good character.

2 At paragraph 766, the Trial Chamber noted the attitude to  
3 court proceedings and generally the respectful manner during the  
4 court proceedings and took that into account as a limited but  
13:03:04 5 nonetheless a mitigating factor. The same would apply, we say,  
6 to Fofana.

7 The most important and crucial part of the Oric judgment  
8 that we seek to impress upon Your Honours is the fact that the  
9 Trial Chamber took into account the circumstances prevailing in  
13:03:22 10 Srebrenica at the time when the offences were committed, and that  
11 is considered at paragraph 767 to 769 of the Trial Chamber  
12 judgment.

13 The Trial Chamber in Oric were acutely aware, as this Trial  
14 Chamber is, of the difficult circumstances in which the convicted  
13:03:42 15 person had operated, and they found that as a persuasive and  
16 pivotal consideration for the purposes of establishing the proper  
17 sentence that should be meted out to the accused.

18 The Trial Chamber noted the abysmal conditions prevailing  
19 in Srebrenica, the same, we say, that presided in Sierra Leone at  
13:04:02 20 the time when the CDF was called upon to defend the civilian  
21 population.

22 The Trial Chamber in Oric described the escalating  
23 offensive by military superior Serb armed forces, the  
24 unpreparedness of the Bosnian Muslims, and unmanageable influx of  
13:04:18 25 refugees and increasing isolation of the town and in areas  
26 resulting in critical shortages of food and other essentials, the  
27 general chaos, and last, but certainly not least, was the flight  
28 from Srebrenica of all the authorities in the same way that the  
29 authorities fled from Sierra Leone, leaving others to take up the

1 cudgels of defence.

2 They said this: "Last but not least, the flight from  
3 Srebrenica of all the authorities, civilian and otherwise, soon  
4 after the outbreak of hostilities and the takeover of the town by  
13:04:54 5 the Serb forces." Again, we say that that echoes and is very  
6 similar to the situation here in Sierra Leone in the early part  
7 of 1998, the time when Fofana's offences are said to have  
8 occurred.

9 Finally then, paragraph 769, the Trial Chamber found that  
13:05:14 10 the evidence demonstrates that the difficulties were enormous,  
11 the same here, we say, especially since the persons who would  
12 have filled in the various positions had fled the town and the  
13 general situation was worsening.

14 There was also the predicament of resisting the ongoing  
13:05:32 15 siege of Srebrenica by Serb forces without a proper army. Again,  
16 the CDF was not a proper army, as the proper army in Sierra Leone  
17 had sided with the rebels. So again, similarities, if not  
18 identical features, between this case and that of Oric. So, no  
19 proper army, without any effective link with the BiH government,  
13:05:59 20 and, in addition, having to depend on a number of voluntary and  
21 poorly armed groups of fighters gathered around local leaders,  
22 some of whom were reluctant to accept any superior command  
23 structure. Again, very similar circumstances to those here in  
24 Sierra Leone.

13:06:19 25 In Oric, the Prosecution sought a sentence of 18 years  
26 imprisonment. The Trial Chamber, notwithstanding that, passed a  
27 sentence of two years and ordered his immediate release from  
28 custody. Oric received two years for failure, pursuant to  
29 Article 7.3, failure to prevent the most serious of crimes:

1 Murder.

2 In conclusion, Your Honours, we submit this: Based on the  
3 authorities, given the limited findings of the Trial Chamber of  
4 guilt against Fofana, combined with the prevailing circumstances  
13:06:57 5 and background in Sierra Leone in which they were committed, we  
6 submit that a sentence of four years or less should be imposed.  
7 This will enable Mr Fofana to return to his community and  
8 thereafter continue to make the positive contribution to  
9 peace-building and civil society that he was making before his  
13:07:19 10 arrest.

11 Your Honour, that concludes our submissions, unless we can  
12 assist further.

13 JUDGE BOUTET: I am not familiar with this case of Oric.  
14 Obviously I will read it very, very carefully. But from just a  
13:07:39 15 very quick scanning of some of the paragraphs you referred to, I  
16 understand that this Oric individual was a Bosnian, he was not a  
17 Serb.

18 MR POWLES: Yes.

19 JUDGE BOUTET: Because you refer to Srebrenica. Srebrenica  
13:07:50 20 is well known for massive murders and killings by the Serbs.  
21 This is, although related, in fact it is a subsequent part of the  
22 Srebrenica episode, if I can call it this. I understand he was  
23 made a police chief and, under the circumstances that existed  
24 then, to try to defend against the Serbs, that's specifically  
13:08:14 25 what it was.

26 MR POWLES: Yes.

27 JUDGE BOUTET: This is the circumstances that existed at  
28 the time; am I right? Okay.

29 MR POWLES: Your Honour, yes.

1 JUDGE BOUTET: I am just trying to see what it was and what  
2 similarity, if any, there could be to this particular case.  
3 That's why I'm asking the question. As I say, I admit that I am  
4 not familiar with the case, but I will make sure that I do so.  
13:08:37 5 Thank you.

6 MR POWLES: Your Honour, it is worth re-emphasising and  
7 pointing out that that context, namely, the massive human rights  
8 abuses being committed by Serb forces, faced by Oric and the  
9 Bosnian Muslim army in Srebrenica, and his conduct and the crimes  
13:08:56 10 committed within that context, that context was taken by the  
11 Trial Chamber in Oric to be the pivotal consideration towards  
12 giving him a lenient sentence, and a pivotal consideration in  
13 terms of mitigation to Naser Oric. We say, of course, that  
14 similar circumstances were faced by the CDF here in Sierra Leone,  
13:09:15 15 namely, massive human rights abuses, and therefore, an untrained  
16 and an informal Civil Defence Force arising to try and protect  
17 the civilian population.

18 JUDGE BOUTET: But where do we get this evidence of massive  
19 human rights violation? I do know, and your position has been  
13:09:35 20 that they were trying, the CDF was fighting to re-establish the  
21 democratically elected government of President Kabbah. This  
22 seemed to be a novel approach today because you are talking of  
23 sentencing. I am not saying there was or there was not. I'm  
24 just asking you what's the evidence that has been led there was  
13:09:54 25 massive human rights violation? This is what they were  
26 established to fight at that particular time. Can you assist me  
27 to find support for that in the evidence or anywhere?

28 MR POWLES: Yes, there were certainly exhibits adduced  
29 during the course of the trial that showed the crimes being

1 committed by the RUF, and those crimes and the response to them  
2 by the CDF being the motivating factor for the establishment of  
3 the CDF in terms of trying to defend the civilian population.

4 Your Honours, I don't have them to hand, but I certainly  
13:10:30 5 recall in our closing submissions making reference to documents  
6 that supported the contention that there were serious human  
7 rights abuses being committed by the RUF and the rebel forces at  
8 the time when the CDF was created and established to try and meet  
9 those human rights abuses being meted out, to try and restore  
13:10:48 10 order and restore the legitimate government and order to this  
11 country, and thereby bring a stop to the human rights abuses that  
12 were occurring. They are part and parcel with the restoring to  
13 government, the legitimate government, restoring democracy in  
14 this country, was to bring an end to the human rights abuses that  
13:11:09 15 were being carried out in the absence of such legitimate  
16 government and such democracy.

17 JUDGE BOUTET: Thank you.

18 PRESIDING JUDGE: Mr Powles, we thank you for your  
19 submissions. We know you have made almost every point that had  
13:12:01 20 to be made, but I think we would like to hear briefly, because  
21 there are certain issues which you said, which we have noted,  
22 that you received a particular request from Mr Fofana to put  
23 across to the Chamber. I think it is only fair, before we  
24 proceed to making a decision on him, that we hear from him, very  
13:12:30 25 briefly, as to what he would like to say to the Court. We have  
26 heard you, if you want to.

27 MR POWLES: Your Honour, I can say on behalf of Mr Fofana  
28 that --

29 PRESIDING JUDGE: If he wants to.



1 MR POWLES: -- these were matters that were canvassed with  
2 him during the course of preparation for mitigation, and these  
3 five points that I have highlighted --

13:12:56

4 PRESIDING JUDGE: We have taken note of them. Your  
5 submission has been comprehensive enough. All we want to say is  
6 at this stage, does Mr Fofana want to address us? If he wishes  
7 to, we are prepared to listen to him. If you feel that you have  
8 said everything you have to say about him, that's fine.

13:13:17

9 MR POWLES: Yes. Your Honour, I should say that those five  
10 points were canvassed with Mr Fofana and were expressly by him,  
11 on his behalf, asked to be made and brought to the attention of  
12 the Trial Chamber. That was our purpose in going through them  
13 this morning with Your Honours.

13:13:35

14 PRESIDING JUDGE: Besides the five points - can you consult  
15 with him - besides those five points, does he have anything he  
16 wants, in addition, to put across to the Chamber.

17 MR POWLES: Your Honour, yes.

13:15:21

18 ACCUSED FOFANA: My people, I want to say thanks to  
19 everybody. I have said five things to my lawyers and they have  
20 said it to you. Those were the words I told to him, but if you  
21 do not understand concerning the five things I said, can he  
22 please go over them again?

13:15:36

23 PRESIDING JUDGE: We understand very well. We understand  
24 very, very well. We thought that you had something in addition  
25 to say. You don't have anything in addition to the five --

26 ACCUSED FOFANA: Well, what he said is what I asked him to  
27 say. That is what I have to say.

28 PRESIDING JUDGE: Thank you very much. Mr Fofana, thank  
29 you. You may sit down.

1 MR POWLES: Your Honour, in those circumstances, that  
2 concludes our submissions.

3 PRESIDING JUDGE: Thank you, Mr Powles. We will move to  
4 the Defence team of the third accused and listen to their  
13:16:11 5 submissions on this sentencing procedure. Mr Margai, you have  
6 the floor.

7 MR MARGAI: Thank you, My Lords.

8 PRESIDING JUDGE: I hope you can still stand on your feet  
9 after the exertion of politics.

13:16:36 10 MR MARGAI: I believe I can, My Lord.

11 PRESIDING JUDGE: Go ahead.

12 MR MARGAI: My Lords, the sentencing brief filed on behalf  
13 of Allieu Kondewa, I submit, is concise and comprehensive, and we  
14 rely on it in its entirety.

13:17:12 15 My Lords, the Prosecution made an observation in their  
16 submission with regard to the form of the brief that it was more  
17 akin to an appellate brief. Be that as it may, it's a matter of  
18 style. The fact that it may be akin to an appellate brief does  
19 not derogate from the fact that the contents remain intact. I do  
13:17:52 20 submit that the Prosecution, out of the 60 minutes allotted them,  
21 spent less than three minutes endeavouring to respond to the  
22 contents of those brief. Unfortunately, even though my learned  
23 friend Kamara tried to take an excursion into conjecturing, Your  
24 Lordship, the Presiding Judge, had to step in to say that if  
13:18:33 25 there is no fact or evidence as to previous crimes committed,  
26 then, of course, that tantamounts to no crime committed.

27 My Lords, it is my submission that with regard to the issue  
28 of difficult circumstances raised by the Prosecution, I would  
29 only adopt the decision in Naser Oric case, cited by my learned

1 friend Powl es, precisely at paragraph 766(viii), continuing on  
2 paragraph 767 at page 262.

3 It is captioned, "Circumstances prevailing in Srebrenica  
4 and those particular to the accused and the crimes committed."

13:20:23 5 Paragraph 767 states:

6 "In the past, Trial Chambers have used the difficult  
7 circumstances if which a convicted person had to operate as  
8 a mitigating factor. The Trial Chamber considers this to  
9 be the pivotal consideration for the purposes of  
10 establishing the sentence that should be meted out to the  
11 accused."

13:20:51

12 My Lords, what we are witnessing today, in my humble  
13 submission, is determining policy consideration in sentencing  
14 accused persons, and that being so, it is my further submission  
15 that this Court cannot but help to take cognizance of the fact  
16 that the war in consequence where of this trial is being  
17 conducted was a rebel war as distinct from a conventional war  
18 where there are rules of engagement. Whatever sentence that is  
19 imposed by this Chamber will not only rest in Sierra Leone but  
20 will be cited in future to determine the conduct of  
21 pro-government militias in rebel war situations.

13:21:24

13:22:16

22 We thank God, My Lords, that the war is over, but this war  
23 was described and has been described as the most brutal known to  
24 mankind. We should not lose sight of that. If it were not for  
25 the sacrifice of the CDF, God knows whether some of us, including  
26 my learned friend Kamara, would be here today. That, I submit,  
27 My Lord, is a factor to be considered, because, otherwise, if a  
28 sentence is severe and there occurs a rebel war, whether in  
29 Sierra Leone or elsewhere, government militias are going to ask

13:23:04

1 themselves the question: Is it advisable for us to intervene.  
2 If we do, might we not be treated in the same manner as Allieu  
3 Kondewa and others?

13:24:11

4 My Lords, on the question of remorse, I beg to differ with  
5 the Prosecution, because in the brief submitted on behalf of the  
6 third accused, Allieu Kondewa, at page 21,960, paragraph 156,  
7 under the rubric, "Expression of Remorse," in particular,  
8 paragraph 157, starting with 156, with your leave, I will read:

13:25:11

9 "Both the ICTR and ICTY have heard the expression of  
10 remorse for crimes committed by accused persons to be  
11 mitigating circumstances."

12 157:

13:25:40

13 "Counsel for Kondewa denies the Prosecution's allegation in  
14 paragraph 173 of the Prosecution sentencing brief that 'Kondewa  
15 has never expressed remorse for his crimes.'"

16 Counsel refers the Trial Chamber to the evidence of  
17 TF2-116, where the question was asked:

18 "Q. So what did he do in Bonthe?

13:26:07

19 "A. He called a public meeting at the town Hall and the  
20 meeting was well attended. A lot of people spoke,  
21 complaints were made. For him, finally he said he did not  
22 allow his men to enter Bonthe. It was unfortunate, but  
23 they did not listen to his advice. They have now entered  
24 and done all what they did, therefore he was sorry."

13:26:31

25 If that is not remorse, then I wonder what is.

26 My Lords, we are here to assist you in determining a  
27 sentence that is appropriate in all of the circumstances. I  
28 believe it behoves us, both as Prosecutors and as Defence  
29 counsel, to present the facts as they occur, so that tomorrow,

1 history will not judge us otherwise.

2 I would only urge Your Lordships that in determining what  
3 sentence you deem appropriate, having regard to all of the  
4 circumstances, that such sentence run concurrently and not  
13:27:34 5 consecutively.

6 My Lords, the norms governing sentencing have been  
7 satisfactorily dealt with in the Naser Oric case, and I think  
8 attempting to elucidate will be a disservice to that judgment,  
9 and therefore I adopt that judgment in its entirety.

13:28:11 10 My Lords, I do not want to attempt to be seen to usurp your  
11 functions by suggesting an appropriate sentence. I have never  
12 been a judge and I do not intend to be one. I believe I have  
13 passed that stage.

14 JUDGE BOUTET: You have already stated that earlier in this  
13:28:30 15 trial, Mr Margai.

16 MR MARGAI: Thank you, My Lords.

17 PRESIDING JUDGE: We have you on record --

18 MR MARGAI: Thank you.

19 PRESIDING JUDGE: -- much earlier in these proceedings when  
13:28:40 20 you made this position clear.

21 MR MARGAI: Thank you, My Lords.

22 JUDGE BOUTET: This is a very interesting experience you  
23 might benefit from Mr Margai, but I respect your decision on this  
24 issue.

13:28:52 25 MR MARGAI: Thank you, My Lords. It has been a pleasure  
26 participating in these proceedings.

27 PRESIDING JUDGE: All I wanted to say is that in life you  
28 can never write off any option until you are down deep in your  
29 grave.

1 MR MARGAI: That is true, but I believe I am far from my  
2 grave, but the strikes I have taken so far, I do not intend to  
3 take backward steps. Be that as it may, My Lords, I would --

13:29:26

4 PRESIDING JUDGE: We know that, and we will take note of  
5 your legitimate ambitions.

6 MR MARGAI: Thank you, My Lords.

7 PRESIDING JUDGE: And we wish you well.

13:29:42

8 MR MARGAI: Thank you, My Lords. I'm grateful. My Lords,  
9 I do not intend to take any more of your time. As the President  
10 rightly stated when we started, each of us is allotted an hour.

11 That does not mean we should utilise the entire 60 minutes. I  
12 believe that what is contained in our brief is comprehensive

13 enough, coupled with the authorities which have been cited, to  
14 assist Your Lordships in arriving a fair, just sentencing that

13:30:11

15 will address future occurrences of a similar nature in a positive  
16 light. I thank you very much.

17 JUDGE BOUTET: Mr Margai, before you sit, if I may, you  
18 were about to propose a sentence when we interjected.

13:30:31

19 MR MARGAI: No, I said I did not want to usurp your  
20 functions.

21 JUDGE BOUTET: That's fine.

22 MR MARGAI: If Your Lordships were to ask me, I would  
23 venture to perhaps suggest --

13:30:43

24 PRESIDING JUDGE: I am sure Justice Boutet - I am not  
25 speaking for him - I am sure he would want you to venture,  
26 because we can benefit from the assistance you can give to us.

27 MR MARGAI: My Lords, considering he has spent over four  
28 years in detention, I believe that a sentence of three years will  
29 not be unreasonable. If he had not spent four years, I'm sure

1 seven years would be appropriate. But having spent four years, I  
2 believe three years would be appropriate, at least for the Court  
3 not to be seen to act in vain.

13:31:33 4 JUDGE BOUTET: Mr Margai, thank you very much. I was not  
5 trying to put you in the hot seat, but just to seek some  
6 assistance what you perceive to be a proper sentence.

7 MR MARGAI: Yes, My Lord.

13:31:49 8 JUDGE BOUTET: I do have one more question, and this is  
9 also to assist us. You said and you stated that you rely on the  
10 brief that has been presented. I do have some problems I want to  
11 pose to you. Because some of the arguments that have been put  
12 forward in this brief are essentially issues which are beyond our  
13 own concern and jurisdiction. We have made findings that the  
14 accused, Kondewa, was guilty and we have made findings of facts  
13:32:17 15 as to why we came to these conclusions. We stand by this  
16 decision.

17 MR MARGAI: And that we accept.

18 JUDGE BOUTET: In paragraphs 27, and 52 to 59, many  
19 paragraphs in this brief, you are, on behalf of Mr Kondewa,  
13:32:34 20 challenging the findings of the Court to say elements have not  
21 been proven beyond reasonable. How are we to deal with that? We  
22 are not, I can tell you, sitting here as an Appeal Chamber.  
23 Obviously these are matters very proper within an appeal and it  
24 is in the domain of the Appeals Chamber to make consideration of  
13:32:54 25 that. We are not here on appeal, we are only here to determine a  
26 fit and proper sentence for what we found to be crimes committed  
27 by your client.

28 MR MARGAI: Your Honour, I apologise for the style. I did  
29 say that it was a matter of style.

1           PRESIDING JUDGE: In fact, I was expecting a backtrack on  
2 those particular points which addressed appellate issues.

3           MR MARGAI: All I would say here, My Lord, with humility is  
4 just take what is relevant to the circumstance of mitigation and  
13:33:30 5 nothing else.

6           JUDGE BOUTET: That's what I was going to suggest to you,  
7 Mr Margai, that we were essentially to ignore those aspects where  
8 challenges are made to our findings, because we stand by our  
9 findings.

10           MR MARGAI: I apologise. I do not want to start casting  
11 blames. I take the responsibility.

12           JUDGE BOUTET: As I say, you are perfectly entitled to  
13 challenge the decision of the Court with the Appeals Chamber.

14           MR MARGAI: I appreciate that, My Lords.

13:33:59 15           JUDGE BOUTET: We have no issue with this.

16           PRESIDING JUDGE: Their views are very open.

17           MR MARGAI: I apologise.

18           PRESIDING JUDGE: Much broader than the Champs Elysees.

19           MR MARGAI: Well, the Appeal Courts have to be kept busy,  
13:34:11 20 otherwise, good morning would be just thrown away.

21           PRESIDING JUDGE: Is Mr Margai through?

22           MR MARGAI: Yes.

23           PRESIDING JUDGE: I see Mr Yada Williams drawing your  
24 attention. You may confer and come back to us, if you wish to.

13:34:39 25           MR MARGAI: At this juncture, My Lords, if it pleases Your  
26 Lordships, may I seek leave to withdraw paragraph 5? I think  
27 that will address the issue.

28           JUDGE BOUTET: Paragraph 5?

29           MR MARGAI: Chapter 5, I'm sorry.



1 JUDGE BOUTET: Yes, paragraph 5, but there is also  
2 paragraph 28, 29.

3 PRESIDING JUDGE: There are many paragraphs.

4 MR MARGAI: This is chapter 5.

13:35:24 5 JUDGE BOUTET: What I am talking about is in chapter 4,  
6 determination of sentence, in the factors in consideration of  
7 length of sentence, 28, 29, 30, 31. Again it deals with the fact  
8 that the accused should not have been found guilty because there  
9 was not enough evidence, and so on. This is the same type of  
10 issue.

11 MR MARGAI: My Lord, as I said earlier, perhaps we ought to  
12 just ignore what is irrelevant and proceed with the relevance.

13 PRESIDING JUDGE: That's fine.

14 MR MARGAI: Thank you.

13:36:02 15 JUDGE BOUTET: We accept that.

16 MR MARGAI: As My Lords please. Again, I apologise.

17 JUDGE BOUTET: Thank you, Mr Margai. I appreciate your  
18 comments.

19 PRESIDING JUDGE: Thank you. I do not know if the  
13:36:13 20 Prosecution has a very brief reply?

21 MR WILLIAMS: May it please Your Lordships --

22 MR MARGAI: Sorry, Your Lordships.

23 PRESIDING JUDGE: Sorry, one step, Mr Kondewa should be  
24 asked, please.

13:36:38 25 MR MARGAI: Could I just confer with him. One second,  
26 please.

27 PRESIDING JUDGE: I want him to know, as opposed to  
28 listening to me through his earphones, that you have said  
29 everything you have to say in this sentencing proceeding. Does

1 he have anything particular, as the accused, to say before we  
2 rise, because we would like to listen to him if he feels that a  
3 particular concern should be addressed. I think it is only fair.

4 MR MARGAI: As My Lord pleases.

13:37:14 5 PRESIDING JUDGE: You may confirm with him, please.

6 MR MARGAI: Thank you. Yes, My Lords.

7 PRESIDING JUDGE: Yes, Mr Margai.

8 MR MARGAI: He would like to address Your Lordships very  
9 briefly.

13:38:11 10 PRESIDING JUDGE: He is very welcome to do that.

11 MR MARGAI: Thank you.

12 PRESIDING JUDGE: Mr Kondewa, please, address us. We are  
13 listening to you.

14 ACCUSED KONDEWA: Judges, good morning -- good afternoon.

13:38:25 15 PRESIDING JUDGE: Good afternoon to you, too.

16 ACCUSED KONDEWA: I want to thank you for everything you  
17 have done. The countries from which you are coming, you have  
18 left your families behind. God bless them all. You are here to  
19 support the peace of this land, and we pray that God will help  
20 us.

13:38:49 21 Prosecutions, good afternoon. The job you are doing, God  
22 help you all. Your relations, you have left behind. May God  
23 bless them all as you go back to meet them.

24 I greet you all, Sierra Leoneans, and I thank you all.

13:39:20 25 Those of you coming from other international countries, I  
26 say thank you all, for even coming to listen to such a Court  
27 procedure.

28 The Sierra Leoneans who are security, I want to thank them  
29 today, their presence here. May God take them back home as they

1 have been here all this time.

2 Even those who are behind the director, who are the  
3 lawyers, I want to thank them all. As you come from different  
4 countries, you fly through the aeroplanes to come and sit on this  
13:40:12 5 issue. I pray that God protect you all and take you back home.

6 Even my lawyers, I want to say thank you all for such a  
7 wonderful job. Everything you have done for me until this time  
8 has now ended. I want to thank you, and I appreciate it of you.  
9 May God bless you and your family and your children.

13:40:37 10 Sierra Leoneans, those of you who lost your relations  
11 within the war, I plead for mercy today, and remorse, and even  
12 for yourselves. May God continue to sustain this nation.

13 As I stand here, I am Allieu Musa. My nickname is Allieu  
14 Kondewa, which has now become a permanent name, and I appreciate  
13:41:17 15 that. As I stand here, my name is now Allieu Kondewa. That is  
16 the name the entire world knows.

17 I came here to protect civilians in the war. Even the war  
18 that took place in Sierra Leone, I didn't go into the war early,  
19 because my child was killed, my sibling was killed. As I stand  
13:42:02 20 here, I am alone; nobody else for me. I am saying the truth. I  
21 am alone in the world. It is just the good things that I have  
22 done that will see me through. I want you to know that is not  
23 just today that I am showing remorse.

24 What brought me into the part of the war, I will explain to  
13:42:39 25 you today. I was in the bush when the Kamajors were fighting in  
26 country. As they were fighting, the war went on for such a time.  
27 Those people with whom we relied upon, whom the government has  
28 taken the soldiers to protect us, they all became rebels, and  
29 they were all fighting against innocent civilians. They killed

1 our people. This was how it happened, and God make a revelation  
2 to me and gave me some medicines and rules, and the rules which  
3 he gave to me, that if anyone who wants to ensure the security of  
4 this nation, if I give you that medicine, you will become a hero.

13:43:46 5 As we were fighting, we fought so that civilians would be  
6 secured and democracy would be restored and the staff be given  
7 back to President Tejan Kabbah. We all fought for that. They  
8 forced him to show that I will show remorse on this issue and I  
9 had remorse in securing the civilians.

13:44:23 10 I was in Bonthe District in a chiefdom called Talia  
11 Yawbeko. I was there one day and the Kamajors were asked to go  
12 and arrest all the people in Bonthe. I was there. No one sent  
13 me, and then I heard that Kamajors were on the rampage. I,  
14 Allieu Kondewa, went into my house, took some money --

13:45:09 15 MR MARGAI: Sorry, My Lords, the interpretation is not as  
16 accurate as it ought to be. For example, when he said, "Go to  
17 Bonthe and capture all of Bonthe." Literally speaking, it is not  
18 to go and capture the people of Bonthe.

19 THE INTERPRETER: Sorry, correction interpretation.

13:45:28 20 PRESIDING JUDGE: May you again confer with him and ask him  
21 to be brief. Let him tell us just the essentials, please. We  
22 want to listen to him. He has a story to tell, really, you know,  
23 we have taken note of his --

24 ACCUSED KONDEWA: I want to say something.

13:45:48 25 PRESIDING JUDGE: Yes, you should say it. You should say  
26 it.

27 ACCUSED KONDEWA: The only thing --

28 PRESIDING JUDGE: Mr Margai, let us not be perceived as  
29 wanting to cut him short. Let us not be understood as wanting to

1 limit what he has to say.

2 MR MARGAI: I have carefully explained --

3 PRESIDING JUDGE: Please, let him say what he has to say  
4 and what comes from the bottom of his heart. I am sure he has a  
13:46:46 5 lot to say. Let him continue. Please, continue.

6 ACCUSED KONDEWA: What I have to explain to this Court so  
7 that they can understand, Talia Yawbeko was the place I was  
8 saying, we were there. These soldiers who entered into the war,  
9 they were in Bonthe. They kill a lot of people. The Kamajors  
13:47:18 10 went there and captured the town. When I say I was with pity to  
11 civilians, it is not only today I am showing remorse to  
12 civilians. I am not educated, but I know if I do goodness, I  
13 will know. I took money from Yawbeko to Matru Jong for 30 miles;  
14 I walked that distance. Nobody sent me. From Matru Jong to  
13:48:00 15 Bonthe, I do not know the mileage, but if they are travelling by  
16 boat from Matru Jong, you will reach Bonthe by 6.00 in the  
17 evening. At that time, I arrived at Bonthe at 6.00. I myself, I  
18 went there and gathered the people, all of them. I said, "I have  
19 heard something, that is the reason I have come but you as the  
13:48:46 20 Kamajor that were elected, what is news here?" There was a man  
21 called Hidukwe [phon]. They say --

22 THE INTERPRETER: Sorry, Your Lordship, can the accused  
23 take the sentence back?

24 PRESIDING JUDGE: Mr Kondewa, don't go into details,  
13:49:12 25 please. Nobody is asking you to defend yourself at this stage.  
26 It is just for you to tell us broadly and briefly what you have  
27 to say. Speak slowly, because you have to be interpreted. We  
28 have a very limited time.

29 ACCUSED KONDEWA: I have accepted, My Lord. I have entered

1 into the war --

2 THE INTERPRETER: Sorry, sir, can the witness take it  
3 again.

4 PRESIDING JUDGE: Mr Kondewa, they say you should take it  
13:49:51 5 again. Start again. Say that again. Slowly, please, because  
6 they have to interpret you properly.

7 ACCUSED KONDEWA: I entered into this war because they were  
8 killing the civilians, they were punishing them, so that  
9 democracy would be restored back to Sierra Leone. I did not do  
13:50:22 10 this to get power. I did it so that I can go back to my bush and  
11 work. Even the Prosecutor who went to arrest me, met me going to  
12 harvest palm nuts. All of my thoughts, nobody ever thought of  
13 me. I was alone in my swamp. All the good things I was doing,  
14 that was the reason they gave me wives. That was the good things  
13:51:08 15 that I have, all those children. The children are young. I  
16 would like the judges to help me so that you can set me free. I  
17 have undergone so much punishment for the sake of Sierra Leone,  
18 and the one I have already undergone, I would like to put a stop  
19 to it now. I thank you very much. Thank you.

13:51:43 20 PRESIDING JUDGE: Thank you very much, Mr Kondewa. You can  
21 sit down, please. Thank you.

22 Mr Prosecutor, learned counsel on both sides, we have come  
23 to the end of this -- yes. I thought -- oh, yes, you want to --  
24 Mr Prosecutor has the word. Please.

13:52:25 25 MR RAPP: Your Honours, I believe before the remarks of the  
26 accused, you invited the Prosecutor --

27 PRESIDING JUDGE: I have no reaction, really, no  
28 enthusiastic reaction from the Prosecutor.

29 MR RAPP: In any case, I did want to very briefly thank

1 Your Honours for the time on this case, for learned counsel and  
2 for our Prosecution team and for everything that has transpired  
3 here to this date.

4 I did want, as I believe you were inviting me, to respond  
13:52:57 5 albeit extremely briefly to the submissions made by counsel for  
6 the accused, and particularly on the issue of law. We have heard  
7 cited the Nzabirinda case from the ICTR, the gentleman who  
8 received seven years. It wasn't said that he was present at the  
9 scene of the crime, the killings. I think if Your Honours  
13:53:21 10 examine that case, you will find that he was not and that he was,  
11 in fact, convicted and pleaded guilty of only being present at a  
12 meeting where security was discussed and, to some extent, the  
13 killers were encouraged by his presence, given his role. So it  
14 was extremely passive.

13:53:41 15 In the case of Blaskic, the case that was 45 years, and  
16 what the Trial Chamber had specifically said, that 6.3  
17 responsibility could be an aggravating factor, it was noted that  
18 on appeal that resulted in some reversal, and a nine-year  
19 sentence, but I invite the Court to examine that case, because I  
13:54:03 20 think you will discover that reversal was on factual grounds,  
21 where a great deal of the counts of conviction and the facts  
22 underlying them were essentially found to be without foundation  
23 by the Trial Chamber, and there was no reversal on that legal  
24 question as far as sentencing is concerned.

13:54:25 25 Finally, particularly as we look at those other cases with  
26 the ICTR, ICTY with very brief sentences, some of which are on  
27 appeal in the Appeals Chamber, we'd invite Your Honours to look  
28 at the actual number of victims killed. There were certainly  
29 examples of large numbers, hundreds in some cases, being detained

1 in prison camps. But in terms of the number of people who lost  
2 their lives, intentionally murdered, I submit that those were  
3 less than what we are looking at here today.

4 Your Honours, in your judgment, have found these  
13:54:58 5 individuals responsible for serious crimes, murder, cruel  
6 treatment, collective punishment, pillage and in the case of one  
7 of the accused, the use of child soldiers. But just simply to  
8 focus on the murder one, specifically in Your Honours' findings,  
9 you found more than 100 people who were murdered. I recall  
13:55:21 10 specifically, and certainly as I reviewed the record, the  
11 testimony of that 65th individual in the line, there were others  
12 ahead of him who were hacked to death, and he indeed was hacked  
13 in an attempt to kill him. If you recall all the facts, those  
14 individuals were being lined up, not in a situation of chaos, but  
13:55:44 15 after the fighting, with no resistance, essentially being lined  
16 up on the basis, "Are you Loko? Are you Limba? You go over  
17 there." No finding that they were collaborators in any active  
18 way and those people were being killed in the most vicious  
19 manner. That is what Your Honours have convicted these  
13:56:01 20 individuals for.

21 I appreciate the comments of counsel Mr Margai in terms of  
22 the effect that Your Honours' judgment will have on internal  
23 conflicts in the world and, indeed, there will be effects to this  
24 judgment, and it is appropriate that there be. In fact, one of  
13:56:19 25 the major factors that we have cited is this issue of deterrence.  
26 I think it is important to remember that, because in those  
27 internal conflicts which will inevitably happen in the future, we  
28 want the message sent that whatever side you are fighting on, no  
29 matter how noble that purpose may be, the restoration of



1 democracy, the protection of your own group, that you are not  
2 permitted in that conflict zone to engage in the targeting of  
3 civilians, the recruitment of children under the age of 15,  
4 robbing them of their childhood, eliminating the possibility that  
13:56:58 5 they will experience what other young people do, brutalising them  
6 for their entire life and turning them into instruments of death.  
7 You are not allowed to engage in the cruel treatment of  
8 individuals. You are not allowed to go out and say, "We want to  
9 kill every civilian in Koribundu because we think that is a rebel  
13:57:17 10 community," and leave nothing standing except for three public  
11 buildings in that community.

12 That's not the kind of rule we want to send to the world.  
13 Clearly we want the rules to apply to both sides. In that  
14 context, that is why it is important in this case that  
13:57:34 15 Your Honours look at the crimes, look, indeed, at all of the  
16 context, but indeed provide for a significant sentence that will  
17 deter others in conflict zones of the world from committing these  
18 similar atrocities and victimising innocent civilians.

19 Thank you, Your Honours.

13:57:51 20 PRESIDING JUDGE: Thank you, Mr Prosecutor for these last  
21 words. I think we have come to the end of our proceedings. We'd  
22 only have to confirm the announcement I have made: We will be  
23 delivering the sentencing judgment on 1 October. Because of  
24 special considerations in our court calendar, we are altering the  
13:58:24 25 time from 3.00 to 11 a.m.. The judgment will be delivered at  
26 11 a.m. as to meet up with some concerns about our calendar.

27 I thank you very much for your collective contributions to  
28 this exercise. Let's adjourn and wait for judgment day.

29 [Whereupon the hearing adjourned at 2 p.m., to be

1 reconvened on Monday, the 1st day of October  
2 2007, at 11 a.m.]  
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